Central Law Journal.

ST. LOUIS, MO., NOVEMBER 1, 1907.

WHAT BREACHES OF CONTRACT DO NOT GO TO THE ENTIRE CONSIDERATION.

We have recently discussed the breaches of a contract which might be taken as going to the whole consideration and some of the principles which were involved in determining the question. Keeping in mind that no hard and fast rule may be laid down to proceed by, because the nature of contracts differ, so that practical experience has demonstrated that to a greater or less extent each case must stand by itself and be determined by the particular objects to be attained, the nature of the breach and all the surrounding circumstances, we now proceed to the consideration of those breaches which are not sufficient to give rise to the right to regard a contract at an end.

The case of Mersey Steel & Iron Co. v. Naylor, 9 H. L. App. C. 438, is a case where a breach was relied upon for the right to rescind. In that case there was a contract for steel to be paid for in installments. At the time one of the installments fell due the company was forced into liquidation, pending which Naylor was advised not to pay the installment. There was no refusal to pay the amount due or anything said or done by which Naylor evinced an intention not to pay for the remainder of the installments as they fell due. It was held that such a breach did not evince an intention not to be further bound by the terms of the contract and did not go to the whole consideration. In the course of the opinion the court reviewed the case of Withers v. Reynolds, 2 B. & Ad. 882, with marked approval. This celebrated case shows very clearly where the line is to be drawn as to what amounts to a total failure of consideration. The contract was for several loads of straw in installments, each to be paid for upon delivery. After some of the loads had been delivered the party to whom delivery was being made refused to pay for the last delivered, saying he would hold one payment in hand to have a check on the one delivering. It was properly held that the refusal to pay for the delivery of the remaining installments upon delivery as agreed, was an abandonment of the contract. It was a total failure. The difference in the breach between the Naylor case and the Reynolds case was, that in the former there was merely a failure to pay at time of delivery and no refusal to pay for either the installment delivered or any intention evinced not to pay for future deliveries contracted for; while in the latter there was an attempt to substitute something materially different from that agreed upon, that is, a refusal to pay upon delivery as agreed during the remainder of the contract to be performed. In the case of Franklin v. Miller, 4 A. & E. 599, Coleridge, J., commenting on the Withers v. Reynolds case, said: "Each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the loads upon delivery, that was a total failure, and the defendant was no longer bound to deliver. In such a case the party refusing has abandoned the contract."

Right here is a proper place to refer again to an erroneous idea that obtains among many lawyers and judges, that there are breaches of contract which would give rise to the right to rescind, and not at the same time the right to regard the contract as abandoned so as to recover damages. This opinion no doubt has arisen through the fact that in many cases parties have not sought damages for the breach, for there are many where rescission alone has been sought and obtained, in fact, in all probability, no damages could have been proved, and yet, damages might have been recovered because of the breach if they could have been proved. When Mr. Justice Coleridge said of the Withers case that such a breach amounted to an "abandonment of the contract" a "total failure," he meant that damages might have been recovered had they been shown in the Withers case.

To further illustrate our point we take the case of Palm v. Railway Company, 18 Ill. 217, where there was a contract to furnish locomotives at stated periods, to be paid for when delivered. There was a mere failure to pay for one of the installments and an attempt was made to recover as for a total breach, the profits which might have been made from full performance. The court in refusing to allow such a recovery because of the mere failure to pay upon deivery as agreed, unless by

express provision in the terms of the contract itself, said that such a breach might give rise to the right to rescind. But that is clearly a mistake, which the more recent decisions definitely show, and yet the idea exists that a contract may be rescinded, though for the same breach there could be no recovery of damages other than those arising out of that particular breach. Suit could have been brought to recover for the particular installment not paid for in such a case.

The courts are now definitely settled upon the rule that rescission can only take place when the acts and conduct of one party evince an intention not to be further bound by the terms of the contract, and that means that there has been a total failure, and is a question of fact for a jury. See Corbin's Ed. Benjamin on Sales, sec. 908. Also 62 Cent. L. J. 161. In this connection we advise the reading of a very able recent article by Mr. Graham B. Smedley, 65 Cent. L. J. 292. If the breach is not such as to evince an intention not to be bound by the terms of the contract it may not be regarded as going to the whole consideration. But whether or not it does is a question generally for a jury or court sitting as a jury.

NOTES OF IMPORTANT DECISIONS.

CONTRACTS — AGREEMENT FOR COMMISSION ON SALES OF PUBLIC LANDS NOT VOID.—While it is the policy of the federal government to avoid the fraud which is so often seen in public land deals, the stool-pigeon acting for a land or lumber syndicate in getting control of homestead entries, and although contracts with parties to make entries for this purpose are void, yet, nevertheless, there are some exceptions and distinctions to be noted. Thus in the recent case of Hoyle v. Johnson, 89 Pac. Rep. 1119, it was held that a contract whereby a party holding a homestead entry on government land, on which is certain improvements, agrees with another party to pay him a certain per cent if he will find a purchaser for such land or improvements, and where such party does find such purchaser, and the purchaser pays to the homestead entryman a certain stipulated sum for his right and the improvements on his homestead, and the homestead entryman goes to the land office and releases his homestead entry, and the other party files thereon, such contract for commission is not void as being in violation of the land laws of the United States.

The court said: "The only grounds urged by plaintiff in error for a reversal of this case is that the contract as made between the plaintiff and defendant was one which was in violation of the United States statutes, in regard to the entering and proving up of public lands, and in support of that he cites section 2362 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1448], which requires the applicant who seeks to enter land under the pre-emption laws to make oath that 'he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same' and in support of their contention that this contract was a contract by which the defendant was to prove up government land for the purpose of conveying the same to a third party, and that the agreement between plaintiff and defendant was made prior to such proving up and that the proving up of the land was a part of the contract, and that, as the proving up under such circumstances would necessitate the committing of perjury, this contract would be void. Counsel for the plaintiff in error select out a small part of the cross-examination of the plaintiff wherein he is made, in answer to a question, to say that this contract was that the defendant would prove up for the benefit of another party, and that they were to sell it to the other party after it was so proved up, but we think that even the portion selected, when viewed in the light of all the other testimony in the case, will not bear this construction. In their brief, they cite the following questions: 'Q. Then your contract—that is, if you had a contract—was that they would prove it up for the benefit of another party? A. Well, yes; about that way. Q. They were to prove it up and sell it, or they were to relinquish it? A. Yes, sir.' Now it will be seen that this latter question embodied two questions—that is, that they were to prove it up and sell it, or to relinquish it—and he makes one general answer to both, 'Yes, sir.' This would not be a very intelligent answer, but we think, when the entire record is examined, it will be apparent that it was not the intention of either the plaintiff or defendant that the proving up of this land was to be a condition precedent to the sale; that the defendant simply contracted with the plaintiff that, if he would procure a purchaser who would buy whatever right he had in the land, and the improvements situated thereon for a certain stipulated price, he would allow him a certain commission. The record shows the fact that he did find such a purchaser, and the purchaser paid the price agreed upon, and that the land was never proven up by the defendant, but that the defendant went with the purchaser to

the land office, and the defendant relinquished his homestead entry and the purchaser filed thereon. We do not think that this case falls within the definition or the section insisted upon by the plaintiff in error. Plaintiff in error cites in support of his contention the decision of the Supreme Court of Oregon, in the case of Jackson v. Baker, 85 Pac. Rep. 512, which provides: 'A contract whereby defendant agreed for a consideration paid by plaintiff and another to convey to a third party the legal title to defendant's homestead when he had obtained title thereto from the United States was illegal and void and unenforceable at the demand of either party thereto.'

There is no question about this being correct law, but there is grave question in the mind of this court as to its having any application to the facts in this case. Here there was no contract that he was to prove it up. He was simply to sell whatever right he had in the land and sell his improvements thereon, and he was to do that which he had a legal right to do, go to the land office and relinquish his homestead entry. The purchaser was to do what he had a right to do, provided he was a qualified entryman, file on that land when the homestead entry was relinquished. The evidence shows that the plaintiff performed on his part all that he agreed to do. He found the purchaser; the purchaser paid the price; the defendant received the price; and, after receiving the price, he seeks to set up the invalidity of his own contract as a defense to his paying his honest debt. Every principle of equity and justice would require that after he had received the benefit of the plaintiff's services, and applied this benefit to his own use, that he should pay the price agreed upon."

STATEMENTS BY ATTORNEYS IN ARGUMENTS, PLEADINGS AND BRIEFS PERTAINING TO RULINGS AND DECISIONS, AS CONTEMPT OF COURT.

The power of courts of justice to punish all persons for contempt of their rulings and orders, for disobedience of their process, and for disturbing them in their proceedings, is an inherent one, and is as old as the courts themselves.[1] And no exception to this power exists where the offender is an attorney, and as such, an officer of the court.

But in view of the countless number of trials and litigations, and of the thousands of attorneys and solicitors who daily practice their chosen profession, it is rather a remarkable fact, and one which speaks well for the legal profession, that the reports contain, comparatively speaking, so few cases where the courts have been called upon to review the professional conduct of the members of the bar. The higher courts have at all times recognized the independence of the profession which carries with it the right freely to challenge, criticise, and condemn all matters and things which properly arise under the issues and evidence, but they have rightly maintained that with this privilege, goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending.[2]

It is well settled that contempt may be committed by inserting in pleadings, briefs, motions, petitions for a rehearing, or other papers filed in court, insulting or contemptuous language, reflecting on the integrity of the court, as well as by using disrespectful language orally in an address to the court.[3]

In a recent Indiana case,[4] an attorney's brief was ordered stricken from the files for using the following, and other disrespectful language therein: "A more outrageous decree never disgraced the record of any court." In sustaining a motion to strike the brief from the files, the supreme court said: "It is always a source of regret to be called upon to review the professional conduct of a member of the bar, and more especially where it involves an alleged reflection upon the honor and integrity of this and the trial court. They are its assistants in the administration of justice, and so intimately related to our judiciary system, and so much a part of it, that thoughtful and self-respecting attorneys seldom allow themselves, however much they may feel aggrieved, to make public expression, in argument or otherwise, derogatory to the rectitude or good intentions of the bench. Invective or scandalous innuendo that tends to degrade a court, or impair its respectability and usefulness, is a matter of such gravity as to impose upon the judge the inexorable obligation to take such steps as may appear necessary to preserve its dignity and good name, even to the expulsion of the

[1] Bac. Abr. Courts (E); Rolle Abr. 219; 8 Cow. 28b; 128 U. S. 289; 25 Miss. 883; 59 Am. & Eng. Ency. of Law (2d Ed).

[2] *In re* Pryor, 18 Kan. 72, 26 Am. St. Rep. 752 and cases there cited.

[3] Note to *In re* Cary, 10 Fed. Rep. 632, 9 Cyc. Law & Proc., 20; case note to 5 L. R. A. (N. S.) 916.

[4] P. C. C. & St. L. Ry. Co. v. M. & P. Trac. Co. (Ind. Sup. Ct.), 77 N. E. Rep. 944.

offender from practicing before it. * * * A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord. The language referred to is offensive, impertinent and scandalous. There is nothing in the record to warrant or excuse it. As a brief we cannot recognize it as a paper or part of the case, and it is our duty to protect the files of this court from becoming the permanent receptacle of such an unworthy document."

In *Re* Alfred Chartz,[5] the respondent an attorney, filed a petition for a rehearing in which he used the following language: "In my opinion the decisions favoring the power of the state to limit the hours of labor, on the ground of the police power of the state, are all wrong, and written by men who have never performed manual labor, or by politicians and for politics. They do not know what they write about." In ordering the petition from the files, and in reprimanding the respondent, the Supreme Court of Nevada speaking by Mr. Justice Talbot, said: "The duty of an attorney in his brief or argument is to assist the court in ascertaining the truth pertaining to the pertinent facts, the real effect of decisions, and the law applicable to the case; and he far oversteps the bounds of professional conduct when he resorts to misrepresentation, false charges and vilification. He may fully present, discuss, and argue the evidence, and the law, and freely indicate wherein he believes that decisions and rulings are wrong or erroneous; but this he may do effectually without making bald accusations against the motives, and intelligence of the court, or being discourteous or resorting to abuse which is not argument nor convincing to reasoning minds. If respondent has no respect for the judges, he ought to have enough regard for his position at the bar to refrain from attacking the tribunal of which he is a member, and which the people, through the constitution and by general consent, have made the final interpreter of the laws which he, as an officer of the court, has sworn to uphold and protect. These duties are so plain that any departure from them by a member of the bar would seem to be willful and intentional conduct."

In a Kansas case,[6] an attorney sent to a district judge, out of court, a letter stating that, "the ruling you have made is directly contrary to every principle of law and everybody knows it, I believe, and it is our desire that no such decision shall stand unreversed in any court we practice in." The court promptly fined the writer $50 and suspended him from practice until the amount was paid. In sustaining the action of the district court the Supreme Court of Kansas, said: "In the first place, the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe imputation. We remark secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. * * * A failure to extend this courtesy and respectful treatment is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. * * * It is so that in every case when a judge decides for one party he decides against another, and oft times both parties are before hand equally confident and sanguine. The disappointment, therefore, is great, and it is not in human nature that there should be other than bitter feelings which often reach the judge as the cause of the supposed wrong. A judge, therefore, ought to be patient, and tolerant of everything which appears but the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak. * * * So an attorney sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may therefore seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a

[5] *In re* Alfred Chartz (Nev.) 85 Pac. Rep. 352.

[6] *In re* Pryor, 18 Kan. 2, 26 Am. St. Rep. 752.

matter which might well be unnoticed, and yet, if all the conduct of the attorney was known, the duty of interference and punishment might be clear."

In the case of Sears v. Starbird,[7] a brief reflecting upon the trial judge was stricken from the record in the supreme court because it contained the following language: "The court out of the fullness of his love for a cause, the parties to it, or their counsel, or from an over zealous desire to adjudicate 'all matters, points, arguments, and things,' could not with any degree of propriety under the law, patch and doctor up the case of the plaintiffs, which, perhaps, the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever." In reference to this language it is said in the opinion: "Here is a distinct intimation that the judge of the court below did not act from proper motives, but from a love of the parties, or their counsel. We see nothing in the record that suggests that such was the case. On the contrary, the action complained of seems to us to have been entirely proper. The brief therefore contains a groundless charge against the purity of motive of the judge of the court below. This we regard as a grave breach of professional propriety."

We would observe that although there are several decisions holding that a brief or pleading, filed in a higher court, which reflects upon the honor and integrity of the lower court, may be stricken from the files, yet it would appear that criticism or contemptuous language in regard to the acts and declarations of the trial judge, used in a brief filed in the appellate court, does not place the writer thereof in contempt of court.[8] These holdings are based upon the principle that a criticism, no matter how unreasonable and vicious, cannot prejudice or impede a cause which has already been tried and terminated, and hence does not constitute a contempt.

But in passing it is interesting to note that there is a line of decisions which hold contrary to the doctrine as just stated, as to whether unjust and untrue criticisms of a past action of the court may constitute a contempt of court. These cases hold that any matter published or spoken which tends to scandalize the court and bring upon it the contempt of the people constitutes the offense of *scandalum magnatum*, and that the court so scandalized could punish summarily for contempt. There is no distinction made between criticism of pending cases and of those already terminated.[9] An interesting case upholding this doctrine is the case of Burdett v. Commonwealth.[10] In that case the appellant Burdett was convicted of selling liquor without a license. After his conviction he caused to be published over his signature a letter in which he charged the judge with having improperly influenced the grand jury which had returned the indictments against him, along with other charges of improper conduct. In sustaining a fine for contempt, Mr. Justice Keith, speaking for the Virginia Supreme Court of Appeals, said: "There is a reasonable jealousy felt by the public with respect to the exercise of the summary power to punish for contempt. Especially is this true as to contempts which consist in 'scandalizing the court.' There is a natural apprehension that personal considerations may influence and bias the judgment of the court. It is, indeed, a delicate matter, and one with respect to which the courts should act with the utmost caution and reserve. That they have done so in this commonwealth, its judicial history fully proves. But while the duty is a delicate one, it is one which cannot be shirked, and the faithful discharge of which is essential to the administration of justice. The courts are the courts of the people; the judges are the servants of the people; and it is their highest duty to the people to see that the streams of justice are kept pure and uncontaminated. If the charges brought in the article which constitute the contempt in this case be true, then the judge of the county court of Nelson deserves the scorn of all good men. In defaming him, the county court, and justice as therein administered, were brought into utter disrepute." We believe however, that it may be safely stated that the weight of authority

[7] Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. Rep. 531.

[8] *In re* Dalton, 46 Kan. 253, 26 Pac. Rep. 673; exhaustive note in 68 L. R. A. 251, reviewing all the English and American cases; 7 Am. & Eng. Encyc. of Law (2d Ed.), 59.

[9] State v. Shepard, 76 S. W. Rep. 79, 57 Cent. L. J. 101, 402; Burdett v. Com. (Va.), 68 L. R. A. 251, 60 Cent. L. J. 10; *Ex parte* Moore, 63 N. Car. 397; *Ex parte* McLeod (D. C.), 120 Fed. Rep. 130.

[10] 68 L. R. A. (Va.), 251, 60 Cent. L. J. 10.

is against the position taken by the court in the Burdett case.[11]

It is firmly established that an attorney may be guilty of contempt for the utterance of words in a contemptuous and insulting manner, when the words themselves are unobjectionable. The question as to whether the words were contemptuously spoken or not is one which the court itself must decide, and this duty is, as is aptly stated by Lord Derman in Wilson's Case,[12] an "unfortunate one," as it requires the court "to act as both party and judge and decide whether it has been treated with contempt."

In the case of Holman v. State,[13] the appellant, an attorney, during the examination of a witness, arose to object to a ruling of the trial court, and was requested to sit down as the court did not care to hear from him on the subject. The appellant did not obey the order of the court, but said: "I will stand here while it suits me to do so." The court then ordered the sheriff to remove the attorney to another part of the room, and while passing the bench the appellant said to the judge, "I will get even with you." For these remarks appellant was held guilty of contempt and fined. There was a counter showing made by appellant in the lower court in which he set up the fact that the judge in ruling upon the objection interposed by him to the ruling of the court, had made an ill-tempered and undignified remark. In commenting upon this this phase of the case the higher court said: "While we are compelled to accept the statement of the judge as true, we can readily perceive, from the explanation contained in the counter statement of the appellant, that the judge was betrayed into a discourteous remark that was likely to inflame the anger of an attorney, and lead him into a line of conduct incompatible with the duty he owed to the court. It is a matter of regret that a judge should manifest bad temper while on the bench, or treat counsel rudely, but the wrong of the judge cannot excuse the misconduct of counsel. It is often necessary for a judge to be stern and determined, but it is never necessary to be ill-tempered or discourteous. Even if we should adopt appellant's theory that the judge was in the wrong, still we cannot assent to the conclusion that he was not himself guilty of a contempt, for the ill-temper or harshness of the judge will not excuse a positive disobedience of the orders of the court, or a contemptuous disregard of its authority."

In *Re* Woolley,[14] the court used the following vigorous language in condemning statements made by an attorney in a petition for a rehearing: "An attorney may unfit himself for the practice of his profession by the manner in which he conducts himself in his intercourse with the court. He may be honest and capable and yet he may so conduct himself as to continually interrupt the business of the courts in which he practices, or he may by a systematic and continuous course of conduct, render it impossible for the courts to preserve their self respect and the respect of the public and at the same time permit him to act as an officer and attorney. An attorney who thus studiously and systematically attempts to bring the tribunals of justice into public contempt is an unfit person to hold the position and exercise the privileges of an officer of those tribunals. An open, notorious and public insult to the highest judicial tribunal of the state, for which an attorney contumaciously refuses in any way to atone may justify the refusal of that tribunal to recognize him in the future as one of its officers."

In United States v. Church of Jesus Christ of L. D. S., language used in a petition filed, in effect accusing the court of an attempt to shield its receiver and his attorneys from an investigation of charges of gross misconduct in office, and containing the statement that "we must decline to assume the functions of a grand jury, or attempt to perform the duty of the court in investigating the conduct of its own officers," was held to be contemptuous.[15]

The fact that the language which constitutes the contempt is contained in a brief or pleading, does not necessitate the giving of notice before punishment can be meted out for the same. The rule governing in cases of this character is stated as follows in Judge

[11] *Ex parte* Green (Tex.), 81 S. W. Rep. 723, and cases there cited.

[12] Wilsons' Case, 7 Q. B. 984.

[13] Holman v. State, 105 Ind. 513. See also *Ex parte* Smith, 28 Ind. 47, where an attorney was fined for contempt for writing on the docket that he had become satisfied that he could not get the law administered, and "when law ceases to be paramount, liberty ceases." Also 28 Ind. 205 and 33 Ind. App. 655, 104 Am. St. Rep. 276, 72 N. E. Rep. 151.

[14] *In re* Woolley, 11 Bush. 95.

[15] 6 Utah, 9, 21 Pac. Rep. 519.

Weeks' excellent treatise on Attorneys at Law:[16] "Language may be contemptuous, whether written or spoken, and, if in the presence of the court, notice is not essential before punishment, and scandalous and insulting matter in a petition for a rehearing is equivalent to the commission in open court of an act constituting a contempt. When the language is capable of explanation, and is explained, the proceedings must be discontinued; but where it is offensive and insulting *per se*, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify the act."

There is some conflict in the authorities as to whether a court of inferior jurisdiction, such as justices of the peace, can punish for contempt independently of statute,[17] but all inferior courts are provided by statute with the power to enforce order when judicial proceedings are in progress, and under this provision, attorneys have been held guilty of contempt for the use of improper language while addressing the court. An instructive case of this nature is found in the reports of the Supreme Court of Vermont.[18] In that case, a lawyer of considerable eminence was engaged in the trial of a case before a justice of the peace, and took frequent occasion to refer to what the supreme court would hold. The justice finally remarked that it would, no doubt suit the attorney to have the supreme court setting all the time. To this remark the attorney replied: "I don't think that is necessary, for I think this magistrate wiser than the supreme court." For this remark the justice fined him $10, and imprisoned him until he should pay it. The case was twice heard in the Supreme Court of Vermont—once on appeal, and once on an application by the prisoner for his discharge upon a writ of *habeas corpus*. In the second hearing, Mr. Chief Justice Redfield, speaking for the court said: "Perhaps it is just to all concerned to say that the relator, upon his own showing, must have used the words adjudged a contempt, in an ironical sense, and intended thus to convert them by sarcasm into a weapon of offense. This is entirely allowable towards those standing in the relations of equality, where no obedience or submission is due. But in those relations where the law, for any cause, requires submission and obedience, the case is different in the relation of parent and child, teacher and pupil, or the court and its bar, the decisions of the superior, for the time being, are final and are to be respected, whether wise or foolish in fact. And they cannot be encountered with sneers and sarcasm, however just and appropriate the weapon may seem to those who use it, or to others. The counsel must submit to a justice's court as well as to this court, and with the same formal respect, however difficult it may be either there or here."

We find the question as to what extent, if any, the legislature may regulate or abridge the power of the courts to punish for contempt, entering into and being discussed in many of the cases pertaining to the subject under consideration in this article. This question is an interesting one, and one upon which the holdings of the courts are not entirely in harmony. It is held by the courts of several of the states,[19] that while the legislature can not take away from the courts their power to punish for contempt, yet it may provide reasonable regulations touching the exercise of this power, the question as to the extent of the regulation being the mooted one. But this holding is assailed on the ground that the power to regulate must necessarily carry with it the power to entirely exclude or shut off, and that it would be a contradiction of terms to say that the power to punish for contempt is inherent but that the legislature may regulate the exercise thereof.[20]

The further objection is advanced to the right of the legislatures to regulate the in-

[16] Weeks on Attorneys at Law (2d Ed.), 206. For illustrative cases on the power of courts to strike out contemptuous pleadings, see Kelley v. Boettcher, 82 Fed. Rep. 794, 27 C. C. A. 177; State v. Kennedy, 60 Neb. 300, 309, 83 N. W. Rep. 87; Schliessner v. Schleissner (Sup. Ct.), 76 N. Y. Supp. 577; Redman v. State, 28 Ind. 205; Green v. Elbert, 137 U. S. 615, 624, 11 Sup. Ct. Rep. 188; Water Co. v. San Diego, 117 Cal. 556, 49 Pac. Rep. 582; Sawdey v. Spokane Falls, 27 Wash. 536, 67 Pac. Rep. 1084; Stoll v. Pearl, 122 Wis. 619, 99 N. W. Rep. 906, 100 N. W. Rep. 1054; Irrigation Co. v. Vickers, 20 Utah, 310, 58 Pac. Rep. 836; National Bank v. Beggs, 108 Ill. App. 672; Brownell v. McCormick, 7 Mont. 12, 14 Pac. Rep. 651; State v. Call, 41 Fla. 450; Tomlinson v. Territory, 7 N. M. 195, 214, 33 Pac. Rep. 950.

[17] Rutherford v. Holmes, 66 N. Y. 372; Newton v. Locklin, 77 Ill. 103.

[18] *In re* Cooper, 32 Vt. 253.

[19] Wyatt v. People, 17 Colo. 261, 28 Pac. Rep. 964; Mahoney v. State, 33 Ind. App. 635, and cases there cited.

[20] State v. Shepard, 76 S. W. Rep. 79.

herent power, in this, that it would necessitate the courts' determining as to the reasonableness of the regulations, which would conflict with the well settled principle that courts are not concerned with the policy or reasonableness of the law, that being a question for the legislature solely. But without quoting extensively from the authorities the better rule would seem to be, that the legislature may regulate only as to those powers which relate to the proper and convenient exercise of the jurisdiction of the courts, such as procedure, but that they have not power to regulate or interfere with the inherent powers of the courts, of which the power to punish for con'empt is an important one.[21]

SUMNER KENNER.

Huntington, Indiana.

[21] Hale v. State (Ohio), 45 N. E. Rep. '99, and cases there cited; *Ex parte* Terry. 128 U. S. 289, 9 Sup. Ct Rep. 77, 32 L. Ed. 405.

MUTUAL BENEFIT SOCIETY—INJURIES SUSTAINED DURING INITIATION.

OSCAR D. THOMPSON v. THE SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD.

Court of Appeals of New York.
Decided October 8, 1907.

The plaintiff was injured while being initiated as a member of one of the defendant's subordinate, unincorporated lodges. The defendant, known as the Supreme Tent, is a foreign corporation for fraternal and insurance purposes, with power to do business in this state. It granted charters to its subordinate lodges, over which it possessed general and exclusive jurisdiction, and made rules and laws for their guidance. It issued to them a ritual, which its officers and members were required to follow, and which provided, in the ceremonies for the initiation of new members, that the master-at-arms, or some other member, should approach the candidate, unobserved, from the rear and seize and draw him back quickly. In carrying out this ceremony the plaintiff received the injuries complained of. It was held that an action could be maintained against the Supreme Tent.

HAIGHT, J.: This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff during his initiation into one of the defendant's subordinate tents. The evidence tends to show that in January, 1903, the plaintiff made an application, in writing, to be admitted to a beneficiary membership in Hopewell Tent, No. 305, of the Supreme Tent of the Knights of the Maccabees of the World, and that a benefit certificate issue for $500, payable to his wife. This application was subsequently approved by the medical officers, and plaintiff was elected to membership in Hopewell Tent, and thereupon in February, 1903, he appeared at a meeting of that tent for initiation. At such meeting one McClure, a post commander of the order, at the invitation of the lieutenant commander, conducted the ceremonies for the initiation of the new members, and during such ceremonies the plaintiff, while standing in line with the applicants for initiation, was suddenly seized from behind by the shoulders, by one Rolland, a member of the order who had been selected for that purpose, and his body bent backward so that he fell against the man who seized him, producing an injury to the muscles, or spinal column, of the back which it is claimed has ever since incapacitated him from manual labor and has caused him much pain and suffering.

While there was some conflict upon the trial with reference to the extent of the injury, the witnesses all substantially agreed with reference to the details of the act complained of. The trial court submitted to the jury the question as to whether the officers and persons conducting the ceremony in question were the agents of the defendant acting within the scope of their authority, to such an extent as to make the defendant liable for the injury produced. This question was raised by the defendant's counsel in his motion for nonsuit and for the direction of a verdict in the defendant's favor, who claimed that the acts complained of were those of the Hopewell Tent, its officers and members, and were not those of the Supreme Tent. This, therefore, becomes the question in the case. If there was evidence given upon the trial sufficient to carry this question to the jury, then the verdict was proper. Otherwise there should have been no recovery.

The Supreme Tent of the Knights of the Maccabees of the World is, as we understand, a Michigan corporation duly organized under the laws of that state, and has been authorized to transact business in this state as a fraternal beneficiary order for the relief, by insurance, upon the mutual or assessment plan, of persons or beneficiaries in the case of disability or death, and its business is transacted upon the lodge plan through subordinate tents or lodges. The plaintiff, at the time of his injury, was given a copy of the laws of the order adopted May 11, 1893, but the defendant introduced in evidence a copy of the revised laws of the Supreme Tent which went into force August 20, 1901. Inasmuch as the plaintiff's injury was received in 1903, we shall consider only the laws of the order then in force. They, in substance, provide that: "The Supreme Tent shall be composed of an unlimited number of great camps and subordinate tents organized as hereinafter provided." "It shall have power to make its own laws, rules and regulations for the government of the association, which shall not conflict with the articles of incorporation or the laws of the land." "It shall possess original and exclusive jurisdiction over all great camps

and subordinate tents." "It shall be the supreme tribunal to which all final appeals shall be made on matters arising unde those laws." "It shall be the judge of the election and qualifications of its members, and decide contested elections." "It shall possess the power to regulate and control its benefit funds, fix the monthly rates on members, receive appeals and redress grievances, provide for its support, and do all other legitimate acts necessary to promote its welfare." "It shall have power, when an appeal is made under the laws of the association from the action or findings of the court of appeals, to decide as to the validity of all death claims or any other claim which a member or the beneficiary of a member may have against it." It, or the board of trustees, when the supreme tent is not in session, "may require the surrender by a great camp of its charter, supplies, records, property and all its money." Its board of trustees is given the power to pass orders to cover any cases which are not provided for in the laws of the association or by the actions of the Supreme Tent, and to suspend beneficiary members from all the benefits of the association in cases specified. The supreme commander is given the general superintendence of the association, with power to grant dispensations for geneal camps and charters to subordinate tents. He may appoint a deputy for each state, and remove from office any tent officer. All the officers provided for by the laws are required to perform such duties as are prescribed by the ritual, and as may be ordered from time to time by the Supreme Tent. The tent commander is required to enforce the laws, rules and usages of the tent and of the association. The lieutenant commander shall aid the commander and perform such other duties as the rules and ritual may require and the by-laws of the tent enjoin. The duties of the other tent officers shall be such as are prescribed in the ritual of the association. All rituals shall be procured of the Supreme Tent. When a tent is suspended all the books, property, etc., must be delivered to the supreme commander of the Supreme Tent. The ritual is a separate book furnished by the Supreme Tent, and, among other things, prescribes the ceremonies that shall be followed upon the initiation of members. The only part of which is necessary to be considered in this case has reference to the proceedings where the lieutenant commander approaches the sir knight commander, stating, "You have forgotten the grip," to which the commander replies, "Oh, yes, the grip." He then addresses the candidate for initiation by stating: "You will follow me and note carefully the motions of my fingers." Then the instructions are partly in cipher, which are translated as follows: "The commander should extend his left hand to candidates as if about to shake hands. When the candidate extends his hand to take that of the commander he should be seized and drawn back quickly by the master at arms or some other member selected for that purpose, who should approach from th rear unobserved by the candidate. As the candidate is thus seized the lieutenant commander should say, 'Sir Knight Commander, an imposter!'" It was during the execution of thi part of the ceremony prescribed by the ritual that the plaintiff received the injury complained of.

The Supreme Tent, as we have seen, is a corporation organized under the laws of anothe state, doing business in this state. It makes the laws, rules and regulations for the government of all the associations under it. It possesses original and exclusive jurisdiction over all great camps and subordinate tents. It establishes great camps and subordinate tents. These camps and tent are unincorporated associations subject to the control and management of the Supreme Tent, which may, when it sees fit, revoke the charter of the great camps or the subordinate tents and require the return to it of all the books, records and property they may possess. We thus have a corporation having jurisdiction and control over all subordinate tents, which has enacted by-laws requiring the officers of such tents to carry out the directions of the ritual established and promulgated by it, in which such officers are required to do the very act which produced the injury to the plaintiff. We think that these laws and ritual furnish evidence from which the jury might find that the officers and members conducting the ceremonies in initiating the plaintiff were not only following the directions of the ritual but that they were also acting as the lawfully constituted agents of the Supreme Tent, within the scope of the authority vested in them, when the injuries complained of were inflicted upon the plaintiff.

The learned appellate division in granting a new trial referred to the case of Jumper v. Sovereign Camp Woodmen of the World, 127 Fed. Rep. 635. We think that case is distinguishable from this case. It did not appear that the loca lodge was an incorporation acting independently of the Sovereign Camp and it did not appear tha the act of violence which resulted in its injurie to the complainant was adopted by the lodge itself and was not authorized by the Sovereign Camp or its practice known to have been indulged in. In the case of Kaminiski v. Knights of Modern Maccabees, 109 N. W. Rep. 33, the Supreme Court of Michigan held that no recovery could be had for injuries of a similar character. In that case the court apparently laid much stress upon the provisions of a by-law to the effect that a subordinate tent and its officers should be the agents of its members in all matters, and that the great camp will not in any case be liable for any fault or negligence on the part of a subordinate tent or any of its officers. In this case the provisions are somewhat different. They provide as follows: "A subordinate tent shall be the agent of its members in making applications for membership, in the admission of members, the collection and transmission to th

Supreme Tent of all dues and monthly rates and in the serving of all notices required under these laws to be served on the members of a subordinate tent." "The Supreme Tent shall not be liable for negligence in any of these matters, nor be bound by any irregularity or illegal action on the part of such subordinate tent." It will be observed that the matters for which the subordinate tent becomes the agent of its members are confined: (1) To the making of applications for membership and their admission. (2) To the collection and transmission to the Supreme Tent of all dues and monthly rates. (3) To the serving of all notices required, etc. Nothing in these provisions pertains to the initiation ritual. Then again, referring to the provisions of the next section, we find that the Supreme Tent shall not be liable for negligence in any of these matters. The matters referred to pertain to the admission of members, the collection and transmission of their monthly rates to the Supreme Tent and to the serving of notices. The Supreme Tent shall not "be bound by any irregularity or illegal action on the part of any subordinate tent." If any of the provisions referred to have reference to the negligence of the officers of the Supreme Tent in executing the requirements of the ritual, it must be found in the latter provision, "as an illegal action." But this, we think, cannot be the construction intended, for, as we have seen, the ritual expressly authorized the suddenly seizing of the applicant unawares and the bending of him backward. To hold otherwise would charge the Supreme Tent with requiring its subordinates to do an illegal act, and then with adopting a by-law to the effect that it would not be liable therefor. It doubtless did not occur to the officers of the Supreme Tent, in adopting the ritual, that the act authorized by them might in some instances produce harm or that some of its subordinate officers might execute the command of the ritual with more force than others. But it is apparent that they intended that the applicant should be taken unawares and frightened. He was to be approached from the rear unobserved, and was to be seized and drawn back quickly, with the announcement of the lieutenant commander, "An imposter." We, therefore, are of the opinion that these provisions ought not to be construed as constituting a contract on the part of the plaintiff to relieve the defendant from liability. But even if they should be so construed, we would still hesitate about adopting the conclusion reached by the Michigan court in the case alluded to; for in matter of Brown v. Order of Foresters, 176 N. Y. 132, we have held that: "In so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members, who had paid their dues and assessments precisely as the regulation required, its action was nugatory." And in the case of Johnston v. Fargo, 184 N. Y. 379, we have held that a corporation or an association cannot relieve itself from liability for personal injuries by reason of the negligence of its own officers, by requiring its servants to enter into a contract to the effect that it shall not be liable therefor. See also Mitchell v. Leech, 66 L. R. A. 723; Knights of Pythias v. Withers, 177 U. S. 260; and note Tumber v. Sovereign Camp, 59 Cent. L. J. 48 52.

We are not disposed to criticise the defendant on account of its being a secret society. Its main object is the insurance of its members against disability and death, and as such we recognize the fact that it has accomplished much good. Coupled with the mutual benefit of its members through insurance, is the social and fraternal feature, which, through the secret rituals of their lodges, have enabled them to keep their members in touch with each other and interested in the work of the tents. We think, however, that other acts might be prescribed by the ritual, from which the importance of the work of the tent might be impressed upon the mind of the applicant without resorting to violence.

The order appealed from should be reversed and the judgment entered upon the verdict affirmed, with costs in this court and that of the appellate division.

Cullen, C. J.; Edward T. Bartlett and Vann, JJ., concur; Werner and Hiscock, JJ., not voting; Gray, J., absent.

Ordered accordingly.

NOTE—*Liability of Lodge or Society for Injuries Sustained During the Progress of Initiatory Exercises.*—We had occasion some years ago in annotating the case of Tumber v. Sovereign Camp Woodmen of the World, 59 Cent. L. J. 48, to touch briefly on the interesting and important question presented in the principal case. The Tumber case was the first decision touching the liability of a grand lodge for injuries sustained during the celebration of initiatory exercises in a local lodge. We took occasion in our annotation to that case to say that the reasoning of Justice McCormick was wholly unsatisfactory, and our observations in that connection seem to have impressed the court in the principal case.

Another case decided last October by the Supreme Court of Michigan was equally unsatisfactory, and to our mind absolutely violative of fundamental principles. We refer to the case of Kaminski v. Great Camp Knights of the Modern Maccabees, 146 Mich. 16, 109 N. W. Rep. 33, where the court held that where an applicant for membership in a fraternal organization agrees to be governed by the rules of the order, which provide that the local lodge is the agent of the applicant, and that the grand lodge shall not be liable for any fault or negligence on the part of the local lodge or its officers, and the local lodge chooses its own officers to perform the initiatory exercises, a ritual provided by the grand lodge, which contains nothing suggesting that the initiation shall be conducted in such a way as to hurt the candidate, the grand lodge is not liable to the candidate for personal injuries inflicted upon him by the members of the local lodge during initiation.

The decision in the Kaminski case is so evidently contrary to all principles of agency that we are surprised that a court of the ability of that of Michigan could have rendered it. If the court had based its deci-

sion on the ground that a benefit society is a public charity and that, therefore, its funds were held in trust for a specified charitable purpose and came within the rule which protects funds held for charity from liability for the negligence of the trustee or his agents there might have been some room for argument or at least a difference of opinion, but where it admits that the grand lodge stands in the position of ordinary master to the local lodge and its officers, but can escape liability for its own negligence or the negligence of its officers in executing the rules and regulations which it prescribes, it states a proposition which finds no support or recognition in any system of civilized jurisprudence; for, as stated by the court in the principal case, "in so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members who had paid their dues and assessments, precisely as the regulations required, its action was nugatory." In the Michigan case the rules prescribed the initiatory exercises, one of whose provisions required that the blindfolded applicant for membership should be suddenly seized and surrounded by the members, branded as a rebel, and his death demanded. Such a procedure would not seem to imply any angelic sweetness or tenderness in the reception to be thus accorded to the new member. The local lodge in carrying out this procedure, seized the applicant with such force as to injure him. If a grand lodge sees fit to prescribe such a childish and barbarous form of initiation it cannot hide itself behind a by-law which it prescribes for its own protection, providing that it shall not be liable for any negligence in the execution of such a ritual. As well might the grand lodge prescribe that the initiation should consist of each member hitting the applicant with a club and then prescribe by by-law that it shall not be liable for any injuries that may result, or plead in an action for damages that it was intended that every member should wield his club gently and not so as to injure the applicant.

A. H. R.

JETSAM AND FLOTSAM.

DIVORCE, THE CHILD, AND THE JUVENILE COURT.

Judge McEwen of the superior court at Chicago has aroused public interest and has created quite a stir, in view of recent legislation, by holding that the legislature cannot, without violating public policy, prohibit the re-marriage of divorced persons. To deprive any man or woman of the right to marry, except upon consideration of age, health, or wrongdoing he holds to be a violation of natural rights. Whether he be right or wrong it is my opinion that the prohibiting of re-marriage of divorced persons will in no way abate the so-called "divorce evil." It may, however, throw some poor women with many children upon the country and increase sexual crimes. The trouble lies not in the getting married nor in the fact of being divorced. The trouble lies in the conduct of the spouses to each other while married. It is this conduct that should be rectified, this conduct which crystalizes into what is known as the "ground for divorce." Some want more, some want fewer, and some want different "grounds for divorce;" but I contend that we should get after the causes for the existence of the "grounds." What caused the cruel and inhuman treatment, what caused the "habitual drunkenness acquired after marriage," what caused the desertion? These are the matters that should concern us and these ultimate causes we should try to eradicate. Let me give a specific example of what I mean. While I was justice of the peace a woman came to me one day all in tears. She told me that ever since her baby was born she had become irritable, peevish, and generally disagreeable; that she had tried hard to overcome it but in vain; that whenever her husband came home she immediately found fault with everything he said or did, called him down for things he had nothing to do with and could not help. At first, he had not said much, but finally, being cut to the quick, he had scolded her severely, whereupon she had lost her temper and had struck him, and that ever since that time there had been no peaceful moment in the house. She had been immediately sorry for everything she had said or done, but although she had tried hard, she could not force herself to go to him, acknowledge the wrong and ask forgiveness. "He cannot understand my condition" she said, and now he is going to apply for a divorce. I love him more than words can tell, and I cannot account for the way I treat him. Oh! What can I do, what can I do? "He cannot understand my condition," she had said, and that was the key-note to the situation. I could plainly see that her nerves were unstrung. I told her to go home and that I would see what I could do for her. I thereupon provided myself with a medical work treating upon nervous diseases, and wrote to the husband asking him to call. I told him just what his wife had told me. I told him that, in my opinion, the whole trouble was due to the condition of her nerves, and that she needed treatment and rest. After reading to him from the book and arguing with him for some time, he finally consented to put his wife under a doctor's care and at least try the experiment. He did as he had promised. After six months he returned. He was beaming all over. The experiment had succeeded, his wife was the same loving creature as ever.

In this case, if the "ground for divorce"—cruel and inhuman treatment, desertion, or drunkenness—did not already exist it would have existed in a comparatively short time. What was the ultimate cause? Nervous prostration. The nerves being cured, all was cured, and there was one divorce less. And now, in juxtaposition to this case let me quote from Judge Lindsey's remarks in "The Problem of the Children," page 82: "Physical defects are often found to be the cause of moral delinquency, and so we have a physical department in connection with the juvenile court. Johnny has been a stupid, dull boy, and brought poor reports. We find that his eyes are poor, his vision defective. They said he was 'poor' or 'bad' because no one knew, no one was interested enough to find out, no one cared. I remember well little Eddie who was recommended for the Industrial School because he was rebellious and had been suspended from school, and therefore went to the street and drifted into idleness, and thence into crime, but Eddie came to this mill in the juvenile court and he was ground through with the rest, but he came out 'poor.' He was in the wrong hopper. He tried it again and we discovered in a few hours' talk with him one afternoon, that he was 'strange and peculiar' as his teacher had declared, but she had never divined the cause. Perhaps she could not. I sent Eddie to the doctor. He found that he had fits when he was seven years old and the nervous trouble had returned in a different form

at twelve, and this was what made him peevish, bull-headed and rebellious. Was Eddie to blame for all this? He was placed under treatment. At the end of eight months the teacher, who declared a year before, meaning well of course, that there was no hope for Eddie this side of the Industrial School, wrote a beautiful letter admitting her error and saying that Eddie was the best boy in school. Here the two surgeons, moral and physical, had come together in the interest of the child, and their work was good and the results were good." Here, then, we have two very similar cases. Formerly, the child was found rebellious and sent to the Industrial School. Now, the cause for the rebelliousness is inquired into, and that cause removed, the result is that the Industrial School is not needed. In divorce matters we have not reached that stage of advancement. The court finds that cruel and inhuman treatment has been committed and grants a divorce. Why not learn the cause producing the cruel and inhuman treament, abate that and preserve the marital union. If the juvenile court can do that, why not the divorce court? The state regulates the matter of marriage and prescribes the conditions for divorce, and there is no reason why the procedure of the divorce action could not be fixed by the legislature to be like that of the juvenile court. If medical treatment be ordered by the court to right the discord between the child and society, and between the child and his parents, why not do the same thing to right the discord between those parents themselves? They are only boys and girls grown up and they are as strange to matrimony as the boys are to the dictates of society. Both are in a new sphere.

This brings me to another similarity. Judge Lindsey tells us that a large proportion of the children go wrong because their parents through false modesty or through ignorance have failed to instruct them in the important things of their physical life. Physicians tell us that family troubles and divorce result only too frequently from ignorance and disobedience of the laws of sex relationship. The only way to save the child, it is proven, is to teach him the whole truth—in a proper manner of course—and this Judge Lindsey aims to do through the medium of the juvenile court. Why not give the parents the benefit of the same instruction? Why discriminate in favor of the next, and against the present generation?

But how about unskillfulness or ignorance of the art of cookery, or of housekeeping generally? Is the judge to give instructions in that? Not at all, but there should be good housekeepers connected with the court as probation officers. A certain benevolent society of Boston is now making the experiment of sending experienced housekeepers to such homes, teaching them cleanliness, cookery, etc., and, as far as I have been able to learn, they are meeting with success. There is no reason why they should not—provided always, that such housekeepers are tactful.

The child is helped, he is not merely found either guilty or not guilty. The policy of the law is to make him a better and a more serviceable citizen. The policy of the law to date is to either grant or refuse divorces—to find either guilty or not guilty—and then the parties are left to shift for themselves. There is no effort to make the parties better and more serviceable spouses. Why not give them (the parents) the same kindly consideration and aid which is given to the children? Why not continue a divorce case two, six, or twelve months, as the case seems to require, with reports, probation and medical examination?

This so-called divorce problem presents, however, another and vastly more important proposition than merely the square deal between the spouses themselves. I have compared the treatment of the parents in their relation to each other with the treatment of the child in his troubles in relation to the public. But has not the child as such a very definite interest in every divorce? Not as to its custody merely but as to its whole future welfare outside of its welfare as between its two parents?

"I believe" says Judge Lindsey "that over half of the children brought to the juvenile court for offenses other than those denominated 'mischievous cases' are practically homeless—that is, there has been a divorce or desertion in the family, and the child has been denied his birthright. The result is the child must suffer and the state must suffer." (p. 100, "The Problem of the Children.")

If the state is interested in the child as *parens patriae* and the child is injuriously affected by family discord and family disruption, then, certainly, the state is interested for the child in the family relation. The juvenile court should be interested in the divorce case. In Colorado and in other states the parents can be brought into the same court with the child and punished if they have contributed to the delinquency of the child. When a child comes to the juvenile court and it is found that divorce has been the original cause, or has contributed to the child's delinquency, it is too late to bring the parents into court to punish them for contributing to it. Nor would the parents be the proper persons to punish. The state should punish itself. It was the state which failed to look after the child's interest when it should and could have done so, that is, in the divorce proceedings.

Mr. Bishop, in his monumental work on Marriage, Divorce and Separation, says: "A divorce suit is a civil proceeding founded on a matrimonial wrong, wherein the married parties are plaintiff and defendant, and the government, or public, occupies without being mentioned in the pleadings the position of a third party—resulting in a triangular and otherwise *sui generis* action of the tort" (par. 489). Whether Mr. Bishop has had the child in mind when he wrote those lines or not, still, the state as *parens patriae* has an interest in the child and the child certainly has an interest in the divorce suit. Now, then, if the public is a party to the divorce action, if the public is the protector of the child and the child is interested in the case why not try the whole matter in one court—call it the Domestic Relations' Court, if you please—using juvenile court methods throughout? As it is the child's own interest in the divorce action is generally overlooked; he has no counsel, no guardian *ad litem*, no testimony is introduced in his behalf, and there is no one to conduct the cross examination for him, except the judge, and he does not do it, at least not from that view point. The matter of custody as between the parties is all that is generally considered.

We need not lull ourselves into believing that the interest of the public in this matter is but a very small one. Bear in mind the statement of Judge Lindsey, made after several years' experience in juvenile court work, that over one half of the cases not denominated "mischievous cases" are traceable to families in which there has been either a divorce or a desertion and then consider the startling statement made by W. C. Copley, of Washington, D. C., a newspaper clipping regarding which I have before me as I write, who has been investigating divorce conditions in the state of Iowa. It reads as follows: "At Sioux City there were about 2000 divorces in the past twenty years,

which was about one-fifth of the number of marriages performed in the same time thereabouts. In other words, one couple in every five secured a divorce. At Marshalltown and Davenport the condition was a trifle worse than that. The figures at these places showed that the ratio was one divorce for every four and three-fourths marriages." In other states it will run, no doubt, about the same.

These statistics do not take into consideration the many desertions for which no divorce is asked. It would be safe to say that divorces and desertions are in the ratio of about one to four at the very least. Let us suppose that in each one of these cases there are on the average three or even only two children involved; do we then still wonder at the increasing waywardness and crime among the young. Does anyone, in the face of this still believe that the child and, for the child, the state has no interest in preserving instead of disrupting the marital relations? Is there not strong reason for the state to say, "Bring the divorces into the juvenile court and let us do all that is possible to form and reform the discordant conditions and avoid the dissolution."

In the case of the child, one does not wait until he has broken some law of the state or some city ordinance. If he lives in such an atmosphere as tends to make it probable that the child will, sooner or later, commit such a breach, he may be brought into court as "growing up in crime" or something of that sort, in order to have the conditions improved and to prevent the probable commission of an offense. Would it not be better for society to employ these same broad equitable principles for the marriage relation. Would it not be public policy in case parties are so conducting themselves as to make it probable that a ground for divorce will arise to apply to the court for preventive relief? Why not have a "snitching bee" in matrimonial matters as well as for childrens' difficulties. (I presume that the readers hereof know that "snitching" is a slang term for tattling and that at a "snitching bee" one tattles on one's self just as the woman tattled on herself to me.)

Of course, the objection will be raised that the handling of matrimonial difficulties in this manner will be a monstrous job, which could not be undertaken by the courts. This is no more so than in the childrens' troubles in a juvenile court. Before anyone seriously raises that objection let him read: "The Problem of the Children" which may be had from the chief probation officer of Denver. The only difficulty is to get a properly qualified judge. But that same difficulty exists in juvenile courts. Judges of such courts will necessarily have differing success. But that is no argument against the method. Many provisions can be made which can be carried out by every judge. As I have stated before the divorce actions should not only be tried by juvenile court methods, but should be tried in the same court.

In former years, when a tooth was bad it was pulled, if a leg was broken it was amputated, if a child committed a crime it was cut out of society and sent to jail. Now the tooth is filled if possible; the leg is healed, if possible; the child is reformed, if possible. I hope the time is not far hence when the family difficulties will be smoothed out and prevented, if possible, instead of cutting the family tie as you would amputate a leg. I do not by any means claim that these methods will be a cure-all. The juvenile court has its failures and so will these methods if applied to divorce. But if divorces can be decreased and family relations be improved great progress will have been made.

HENRY E. C. DITZEN,
Ph. B., L. L. B.

BOOK REVIEWS.

HUGHES' DATUM POSTS OF JURISPRUDENCE.

This is the title of Mr. W. T. Hughes' new work which reiterates the principles of jurisprudence after the manner of his other works, which is peculiarly original. To the readers of the CENTRAL LAW JOURNAL Mr. Hughes needs no introduction. Those who have delved into his works on Contracts and Procedure, know the riches, the wealth of learning, enclosed in their pages. They know too, what a world of real help they have derived as they "long with zeal have conned the pages o'er" and may exclaim in a vein somewhat similar to that of Dante in his tribute to Virgil, "My master thou and guide, thou he from whom I have derived that style which for its beauty into fame exalts me."

The readers of this Journal will undoubtedly remember an article by Mr. Graham B. Smedley, of Midland, Texas, entitled "The Right of Recovery for the Partial Performance of Entire Contracts." What a world of elucidation and comprehension is shown by his use of Mr. Hughes' work on Procedure. The glow of it lightens every page of this splendid article and brings the author clearly forth in the light it sheds. Not that Mr. Smedley was not already a fine writer and a man of excellent legal ability, but he demonstrates in his article the touch of a master hand, which reveals in him the beauty and force of it.

It is because we have been often struggling in a quagmire of precedents which had no kindly light to lighten up a dark and muddy way that we welcome such works as Mr. Hughes has turned out. Mr. Hughes throws upon his page the beacon lights of the ages, which having caught sight of, we are led to terra firma once more and up a mountain to a commanding view-point where, we see as never before that a study of procedure is a study of government, and that government is due process of law.

Says Mr. Hughes in the preface to this most useful work. "The corruption and failure of jurisprudence is a near step to a national cataclysm." We beg to quote:

> "There is the moral of all human tales,
> 'Tis but the rehearsal of the past,
> First freedom and then glory—when that fails,
> Wealth, vice, corruption—barbarism at last.
> And history with all her volumes vast hath but one page."

The best means of avoiding the dangers thus pointed out, is in the establishment of justice through a uniform system of jurisprudence so well administered that all will commend the administrators. We are standing today amidst wealth, vice, corruption, and the way out must be by a reformed system of procedure for the whole country, interpreted by the very best legal talent the land can afford.

"Antiquity did nothing in vain and its greatest gift to posterity is the *datum posts* of jurisprudence," says Mr. Hughes: "From these the simplicity, the morality, the intensive usefulness, the history and philosophy of the law must be demonstrated. The maxims are old and well-worn but then they have worn best. There is no branch of the law that is not traceable from the maxims, acorns, roots or heartwood. It was from these rudiments that Paul spoke before Festus and Agrippa. And who has been more powerful or more eloquent? The Romans understood and reasoned from these *datum posts* and who have built better? His laws did more for the undying glory of Rome than did her armies and navies.

'Peace hath her victory not less renowned than war.' Statesmen and jurists have always defended and vindicated the fundamental maxims as the greatest asset of government, and in defense of them have continually repeated the injunction, Remove not the ancient landmarks thy fathers have set."

This work is a fine specimen of the printer's as well as the binders' art. It is contained in 250 pages, bound in buckram in one volume. No lawyer who loves his profession and desires to excel as an accurate thinker should be without this book. It sells for $3.50.

Published by the author. Selling agents, CENTRAL LAW JOURNAL CO., St. Louis, Mo.

BOOKS RECEIVED

Datum Posts of Jurisprudence. By William T. Hughes, Author of "Contracts" and of "Procedure." Chicago: Published by the Author. 1907. Price $3.50. Selling Agents: CENTRAL LAW JOURNAL COMPANY. Reviewed in this issue.

Handbook of the Law of Suretyship and Guaranty. By Frank Hall Childs, LL.B. Late Lecturer on Suretyship and Guaranty, Chicago—Kent College of Law. St. Paul, Minn. West Publishing Co. 1907. Review will follow.

Handbook of the Law of Evidence, Second Edition. Revised. By John Jay McKelvey, A. M., LL. B., of the New York Bar; Author of "Common Law Pleading," etc. St. Paul, Minn. West Publishing Co. 1907. Review will follow.

Proceedings of the Illinois State Bar Association. Thirty-first Annual Meeting, Galesburg, July 11 and 12, 1907. Edited by John F. Voigt, Jr., Secretary. Springfield: Illinois State Register Book Publishing House. 1907.

HUMOR OF THE LAW.

In a suit lately tried in a Maryland court, the plaintiff had testified that his financial position had always been a good one. The opposing counsel took him in hand for cross-examination and undertook to break down his testimony upon this point.

"Have you ever been bankrupt?" asked the counsel.

"I have not."

"Now, be careful," admonished the lawyer, with a raised finger. "Did you ever stop payment?"

"Yes."

"Ah, I thought we should get at the truth," observed counsel, with an unpleasant smile. "When did this suspension occur?"

"When I had paid all I owed," was the naive reply of the plaintiff.

Judge Lumpkin is not only a learned lawyer, but he also possesses the keenest sense of humor.

When he was on the bench in this circuit, a countryman took him to one side, and, in great confidence, told him he wanted his opinion on a question of law. The judge allowed him to proceed. He said:

"Jedge, I want to ask you this: if a man have a aunt and she die, do de the law apply?"

This was too indefinite for his honor to give a written opinion on, but the countryman wanted a slice out of his aunt's estate, and with no heirs at law, the judge advised him to get him a lawyer.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

ALABAMA....38, 66, 72, 90, 118, 133
ARKANSAS....60, 117, 138, 151
CONNECTICUT....96
FLORIDA....36, 53, 67, 78
GEORGIA....10, 22, 39, 75, 81, 87, 89, 116, 130, 152
INDIANA....9
IOWA....6, 35, 58, 69, 79, 83, 85, 124, 140, 155, 159
KENTUCKY....11, 44, 92
LOUISIANA....127, 139
MAINE....5, 82, 84, 99, 101, 148, 153, 160
MARYLAND....1, 37, 49, 54, 56, 64, 86, 100, 150
MICHIGAN....48, 102, 111, 114, 134, 143
MINNESOTA....61, 76, 103, 109, 115
MISSISSIPPI....91
MISSOURI....77, 158
NEW JERSEY....47, 55, 57, 88, 157
NORTH CAROLINA....131
NORTH DAKOTA....2, 52, 68
PENNSYLVANIA....12, 63, 70, 95, 121, 122, 156
RHODE ISLAND....46, 129
SOUTH CAROLINA....40, 41, 71, 137, 141, 146
TEXAS....7, 94, 97, 110, 123, 132, 144, 145
UNITED STATES C. C., 42, 43, 50, 59, 62, 78, 93, 98, 104, 108, 128, 135, 136
U. S. C. C. OF APP., 3, 8, 16, 21, 25, 27, 28, 30, 31, 32, 51, 65, 74, 80, 105, 106, 107, 112, 118, 119, 125, 126, 147, 149, 154
UNITED STATES D. C., 13, 14, 15, 18, 19, 20, 23, 24, 26, 29, 33, 34, 120
VERMONT....17
WISCONSIN....4, 45, 124

1. ACCIDENT INSURANCE—House Confinement Under Health Policy.—In an action on a disease and accident policy the clause "shall be necessarily confined to the house" construed to mean any part of the house, inside or on the porch.—Dulany v. Fidelity & Casualty Co. of New York, Md., 66 Atl. Rep. 614.

2. ACTION—Mechanics' Liens.—A cause of action for equitable relief from a forfeited mechanic's lien may be joined with a cause of action to recover the penalty for failing to release the lien on demand.—Sheets v. Prosser, N. Dak., 112 N. W. Rep. 72.

3. ADMIRALTY—Vacation of Decree.—Summary proceedings held not maintainable in admiralty to set aside and satisfy a decree previously entered, where collateral controversies either between the parties or the original litigation was involved.—Carroll v. Davidson, U. S. C. C. of App., Seventh Circuit, 152 Fed. Rep. 424.

4. ADULTERY—Evidence.—On a prosecution for adultery, defendant's admissions of specific facts not themselves constituting the crime charged, or any part of it, but furnishing links in the chain of circumstantial evidence, are admissible.—Till v. State, Wis., 111 N. W. Rep. 1109.

5. ADVERSE POSSESSION—Evidence.—Where one enters on land after bidding in the same at a tax sale, his intention to occupy adversely during the year allowed for redemption must be shown by some unequivocal act hostile to the owner's title.—Lancey v. Parks, Me., 66 Atl. Rep. 311.

6. ANIMALS—Damages for Wrongful Killing.—In an action for the killing of a sow, in which a counterclaim is interposed for damages to defendant's property caused by the sow, it is proper to show the market value of the crops destroyed where the testimony shows the amount of grain destroyed.—Warrick v. Reinhardt, Iowa, 111 N. W. Rep. 988.

7. APPEAL AND ERROR—Assignment of Error.—An assignment of error attempting to collect every point on which the appeal was based into one point held multifarious and fatally defective.—Russell v. Deutschman, Tex., 101 S. W. Rep. 1164.

8. APPEAL AND ERROR—Mandamus.—A writ of *mandamus* is, and a writ of error is not, the proper remedy for the refusal of a circuit court to prescribe the method and direct the service of a writ of *scire facias*, and also for its refusal after sufficient service to take jurisdiction of, and to decide the issues presented by, the writ.—Col-

lin County Nat. Bank v. Hughes, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 414.

9. APPEAL AND ERROR—Motion to Vacate Order Appointing Receiver.—The filing by appellant of a motion in the lower court to vacate the interlocutory order appointing a receiver, appealed from, does not preclude a further prosecution of the appeal.—Continental Clay & Mining Co. v. Bryson, Ind., 81 N. E. Rep 210.

10. APPEAL AND ERROR—Refusal to Grant Writ of Quo Warranto.—A writ of error lies from the refusal of a judge of the superior court to grant leave to file an information in the nature of a writ of *quo warranto*.—McWilliams v. Jacobs, Ga., 57 S. E. Rep. 509.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Balance of Assets.—An assignor who controls and directs the disposition of the estate to the detriment of the creditors and delays a settlement in order to make adjustments satisfactory to himself cannot recover from the assignee assets alleged to remain in the latter's hands after the creditors are paid.—Commonwealth v. Scoville, Ky., 101 S. W. Rep. 1188.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS—Who May Share in Assets.—Claims arising after assignment for benefit of creditors and claims depending on happening of contingency in the future held not entitled to share against an assigned estate.—*In re* Chestnut St. Trust & Saving Fund Co.'s Assigned Estate, Pa., 66 Atl. Rep. 332.

13. BANKRUPTCY—Attorney's Fees.—Where a composition offered by a bankrupt which includes the payment of all costs is confirmed after opposition, the bankrupt's attorney will not be allowed fees from the estate for his services in securing the confirmation.—*In re* Martin, U. S. D. C., E. D. N. Y., 152 Fed. Rep. 582.

14. BANKRUPTCY — Authority to Refer.—A court of bankruptcy has authority to refer a petition for an order requiring a bankrupt to turn over money or property to a special master for hearing and an examination of the bankrupt.—*In re* Herskovitz, U. S. D. C., E. D. N. Y., 152 Fed. Rep. 316.

15. BANKRUPTCY — Commitment for Contempt.—An order of a court of bankruptcy restraining a sheriff from arresting a bankrupt on civil process, following the language of Bankr. Act, ch. 541, § 9a, does not prevent the commitment of the bankrupt by a state court for a contempt, where such commitment is intended as a punishment and not for the collection of the debt.—*In re* Fritz, U. S. D. C., E. D. N. Y., 152 Fed. Rep. 562.

16. BANKRUPTCY—Contract to Furnish Money for Composition.—A contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal, and will not support an action by the bank to recover from another creditor the amount he received under the composition, and which by such contract, to which he was a party, he agreed to return to the bank.—McCormick v. Solinsky, U. S. C. C. of App., Fifth Circuit, 152 Fed. Rep. 984.

17. BANKRUPTCY—Debts Created by Fraudulent Representations.—A person who fraudulently obtained a flock of sheep held not discharged from the debt by his discharge in bankruptcy.—Rowell v. Ricker, Vt., 66 Atl. Rep. 569.

18. BANKRUPTCY—Discharge.—Specifications of objection to the discharge of a bankrupt which are in language of the statute, without more, and which contain no statement of facts, are not amendable.—*In re* Bromley, U. S. D. C., E. D. Pa., 152 Fed. Rep. 498.

19. BANKRUPTCY — Discharge.—Under rule 41 in the Eastern district of New York it is the duty of objecting creditors to see that a bankrupt's application for discharge is referred to a referee as special master, and to arrange for the hearing thereon.—*In re* Eldred, U. S. D. C., E. D. N. Y., 152 Fed. Rep. 491.

20. BANKRUPTCY—Discharge.—On the hearing of an application for the discharge of a bankrupt, the burden of proof to sustain the specifications of objection is upon the creditors who filed the same, and that burden never shifts.—*In re* Walder, U. S. D. C., D. Conn., 152 Fed. Rep. 489.

21. BANKRUPTCY—Failure of Creditor to Answer Petition.—A creditor who fails to answer a petition in bankruptcy waives all objections to subsequent amendments thereof which do not change the substance of the cause there stated nor the extent of the relief sought.—*In re* Broadway Sav. Trust Co., U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 152.

22. BANKRUPTCY — Fraudulent Conveyance.—A discharge in bankruptcy does not preclude the trustee from recovering property of the bankrupt's estate which has been fraudulently transferred.—Hunt v. Doyal, Ga., 57 S. E. Rep. 489.

23. BANKRUPTCY — Fraudulent Conveyance.—Where a fraudulent transfer of property is charged as an act of bankruptcy, in an involuntary petition, great latitude in the admission of evidence should be allowed on the trial, and all the circumstances fairly connected with the transaction may be shown.—*In re* Luber, U. S. D. C., E. D. Pa., 152 Fed. Rep. 492.

24. BANKRUPTCY—Fraudulent Conveyance.—A bankruptcy court held without jurisdiction, in the absence of defendant's consent, of a suit to set aside an alleged fraudulent conveyance of the bankrupt's property as a fraud on creditors; the citizenship of the parties being the same.—Skewis v. Barthell, U. S. D. C., N. D. Iowa, 152 Fed. Rep. 534.

25. BANKRUPTCY—Fraudulent Transfers.—A transfer by insolvent within four months prior to filing of petition in bankruptcy to secure pre existing debt held not evidence of intent to hinder, delay, or defraud creditors within Bankr. Act, ch. 541, § 67e.—Coder v. Arts, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 943.

26 BANKRUPTCY—Funds in Hands of State Court.—A court of bankruptcy is without jurisdiction to determine rights in a fund which at the time of the bankruptcy had been brought into the control of a state by garnishment proceedings, and to which the bankrupts and others were adverse claimants, unless by consent of all of the parties in interest.—*In re* Kane, U. S. D. C., E. D. Pa., 152 Fed. Rep. 587.

27. BANKRUPTCY—Intent to Prefer Creditor.—Payments made by a debtor to *bona fide* creditors in the ordinary course of business, without intent to prefer, required by Bankr. Act, ch. 541, held, not to constitute acts of bankruptcy.—Goodlander Robertson Lumber Co. v. Atwood, U. S. C. C. of App., Fourth Circuit, 152 Fed. Rep. 978.

28. BANKRUPTCY — Jurisdictional Facts.—The issue whether or not a corporation is subject to adjudication as a bankrupt is not jurisdictional and is concluded by the adjudication.—*In re* First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 64.

29. BANKRUPTCY—Novation.—Where an assignee of wage claims exchanges them with bankrupts for their note and due bill held there is a novation extinguishing the preference.—*In re* Fuller & Bennett, U. S. D. C., S. D. W. Va., 152 Fed. Rep. 538.

30. BANKRUPTCY—Preferential Payments.—In an action by a bankrupt's trustee to recover an alleged preferential payment, the burden was on the trustee to show that the creditor had reasonable cause to believe that the bankrupt intended to give a preference by such payment.—Calhoun County Bank v. Cain, U. S. C. C. of App., Fourth Circuit, 152 Fed. Rep. 983.

31. BANKRUPTCY — Property Held by Bankrupt in Trust.—Where none of the creditors of a bankrupt extended credit to him in reliance on his ownership of property which while standing in his name was in fact held by him in trust for others, his trustee takes no greater interest or right therein than he himself had, and if the trust was enforceable in equity against him, it is equally so as against his trustee.—*In re* Coffin, U. S. C. C. of App., Second Circuit, 152 Fed. Rep. 381.

32. BANKRUPTCY—Title of Trustee.—A trustee in bankruptcy has no better title than the bankrupt, in the absence of fraud, or of attaching or judgment creditors at

the time of the filing of the petition.—*In re* Great Western Mfg. Co., U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep 128.

33. BANKRUPTCY—Preference.—A creditor receiving payment otherwise than by descent held a "purchaser" within Bankr. Act, ch 541, § 67e.—Wright v. Sampter, U. S. D. C , S. D. N. Y., 152 Fed. Rep. 196.

34. BANKRUPTCY—Stay of Action Against Bankrupt.—On an application to a district court in bankruptcy to stay an action against a bankrupt, or to vacate such a stay, the court is not required to enter into an investigation *dehors* the pleadings in such action to ascertain its nature.—*In re* Adler, U. S. C. C. of App., Second Circuit, 152 Fed. Rep. 422.

35. BANKS AND BANKING—Continuing Business After Expiration of Charter.—A bank continuing to transact business after its charter has expired is a *de facto* corporation; the stockholders not becoming liable only as partners on the charter's expiration.—Elson v. Wright, Iowa, 112 N. W. Rep. 105

36. BILLS AND NOTES—Consideration.—A "note or memorandum" for the sale of land is not void on its face because part of the consideration is to be in the form of "a note (negotiable)."—Conroy v. Woodcock, Fla., 43 So. Rep. 693.

37. BROKERS—Failure to Obey Instructions.—A stock broker failing to obey the orders of a customer regarding the sale of stocks, is liable only for the actual loss which the customer sustains by reason of such failure.—King v. Zell & Merceret, Md., 66 Atl. Rep. 279.

38. CARRIERS—Delay in Transportation of Goods.—A carrier held liable for damage caused to goods by a cyclone where its delay in forwarding was an active cause until the consignee had a reasonable time to remove the goods.—Alabama Great Southern R. Co v. J. A. Elliott & Son, Ala , 43 So. Rep. 738

39. CARRIERS—Carrying Passenger Past Station.—Though a passenger's ticket may only entitle him to be carried to a certain station, yet if he be afforded no opportunity to alight but is carried beyond the point and there put off, he may recover.—King v. Southern Ry. Co., Ga., 57 S. E. Rep. 507.

40. CHATTEL MORTGAGES—Redemption by Purchaser.—After a chattel mortgagee recovers a verdict for possession as against a purchaser of the mortgage chattels, the latter may redeem by paying the amount for which the mortgage was indexed, with interest.—Burriss v. Owen, S. Car., 57 S. E. Rep. 542.

41. COMMERCE—Attachment.—Car owned by foreign railroad company and shipped into the state loaded with interstate commerce cannot be attached before unloaded, in a suit by a resident against the foreign railroad company.—George D. Shore & Bro. v. Baltimore & O. R. Co., S. Car., 57 S. E. Rep. 526.

42. COMMERCE—Employer's Liability Act.—Employer's Liability Act, Act Cong., June 11, 1906, ch. 3073, 34 Stat. 232, held not unconstitutional as not within the power of congress, conferred by the commerce clause of the federal constitution.—Plummer v. Northern Pac. Ry. Co., U. S. C. C., W. D. Wash., 152 Fed. Rep. 206.

43. COMMERCE—Power to Regulate.—Though, as a general rule, the police power belongs to the state, congress may, in regulating interstate commerce, impose regulations which are in their essential nature police regulations.—Kelley v. Great Northern Ry. Co., U. S. C. C., D. Minn., 152 Fed. Rep. 211.

44. COMMERCE—Transportation of Goods.—Where a carrier which had published its rates for interstate traffic joined with other carriers in transporting marble from Vermont to Kentucky held, that the shipment was interstate commerce and subject to the rates provided therefor.—Corcoran v. Louisville & N. R. Co., Ky., 101 S. W. Rep. 1155.

45. CONSPIRACY—What Constitutes.—Any combination of two or more persons to do a criminal or unlawful act by any means, or to do a lawful act by criminal or unlawful means, is an actionable conspiracy at common law, and upon the purpose thereof being consummated, a person injured may recover damages.—White v. White, Wis., 111 N. W. Rep. 1116.

46. CONSTITUTIONAL LAW—Care of Sidewalks.—A city ordinance requiring persons in charge of property to remove the snow from adjoining sidewalks held not to contravene Const U. S. Amend. 14, by depriving them of property without due process of law.—State v. McCrillis, R. I., 66 Atl. Rep. 301.

47. CONSTITUTIONAL LAW—Deprivation of Property.—Chancery Act, Revision 1902, § 60 (P. L. pp. 581, 582), authorizing payment of a sum in gross to the holder of a life estate in real property out of the proceeds of land sold on foreclosure, held not unconstitutional.—Leach v. Leach, N. J., 65 Atl. Rep. 695.

48. CONSTITUTIONL LAW—Municipal Corporation.—A provision of a city charter exempting the city from liability for injuries sustained in consequence of neglect to keep any sidewalk clear of obstructions held not invalid as being class legislation.—Maclam v. City of Marquette, Mich., 111 N. W. Rep. 1079.

49. CONSTITUTIONAL LAW—Regulating Practice of Medicine.—Code Pub. Gen. Laws 1904, art. 43, § 83, providing for the registering of physicians and exempting certain persons from its provisions, held not in violation of the fourteenth amendment of the United States Constitution.—Watson v. State, Md., 66 Atl. Rep. 635.

50. CONSTITUTIONAL LAW—Retroactive Statutes - A retroactive statute is not unconstitutional, unless its effect would be a deprivation of life, liberty, and property, contrary to the fifth amendment of the federal constitution.—Plummer v. Northern Pac. Ry. Co., U. S. C. C., W. D. Wash., 152 Fed. Rep. 206.

51. CONTRACTS—Restraint of Trade.—Where a contract for the organization of a corporation in order that the same might be controlled by a trust was void as in restraint of trade, and the trust's interest was represented by its president in person, it was no objection to the defense that the contract was void, that the trust was not a formal party to the proceeding.—McConnell v. Camors-McConnell Co., U. S. C. C. of App., Fifth Circuit, 152 Fed. Rep. 321.

52. CONTRACTS—Undue Influence.—Where contracts between persons occupying relations of trust and confidence were procured by undue influence, or if they are grossly unfair or inequitable, the courts will not hesitate to cancel them.—Fjone v. Fjone, N. Dak., 112 N. W. Rep. 70.

53. CORPORATIONS—Contracts.—Unless its charter or governing statute requires it, a corporation may contract and bind itself without the use of its corporate seal in all cases in which individuals can do so.—Griffing Bros. Co. v. Winfield, Fla., 43 So. Rep. 687.

54. CORPORATIONS—Liability of Directors.—Where directors of a coporation, with knowledge that a corporate officer had misappropriated corporate funds, continued him in office, and, by their manner of dealing with him, made possible still further losses of corporate funds, they were responsible for the losses so sustained by the corporation.—Murphy v. Penniman, Md., 66 Atl. Rep. 282.

55. CORPORATIONS—Liability on Stock.—Where corporate stock is issued in exchange for a patent which was grossly overvalued, held the stockholders are liable for debts of company.—Honeyman v. Haughey, N. J., 66 Atl. Rep. 582.

56. CORPORATIONS—Mismanagement of Corporate Affairs—A bill in equity by the receivers of an insolvent corporation to enforce the liability of the directors for certain losses held not subject to demurrer on the ground that one of the receivers was also a director.—Murphy v. Penniman, Md., 66 Atl. Rep. 282.

57. CORPORATIONS—Right to Dividends.—Where corporate stock is issued as fully paid for property purchased at an overvaluation, held, that the stock was not subject to further call by suppression of dividends from net profits.—Goodnow v. American Writing Paper Co., N. J., 66 Atl. Rep. 607.

58. CORPORATIONS—Stockholder's Liability.—A stockholder held not relieved of individual liability, under Code, § 1616, for debts of the corporation for failure to publish notice of incorporation, because he was not an organizer or promoter.—Clinton Novelty Iron Works v. Neiting, Iowa, 111 N. W. Rep. 974

59. CORPORATIONS—What is Doing Business in Foreign State?—That the secretary of a foreign corporation went into another state for the purpose of attending to the taking of depositions in a suit to which the corporation was a party does not constitute the doing of business by the corporation in such state, nor render it amenable to suit in a federal court therein by service upon such secretary while there.—Ladd Metals Co. v. American Min. Co., U. S. C. C., D. Oreg., 152 Fed. Rep. 1008.

60. COSTS—Penalty for Taking Appeal for Purpose of Delay.—Where a case is in good faith brought to the state supreme court, to obtain a review in the federal supreme court, appellant is not subject to a penalty for taking appeal for delay.—Bonner v. Gorman, Ark., 101 S. W. Rep. 1153.

61. COUNTIES—Cost of Repairing Court House.—The reasonable cost of repairing a court house held incidental to the management and not unlawful, though the amount thereof, added to other current expenses, exceeds the limitation of the taxing power of the counties.—Upton v. Strommer, Minn., 111 N. W. Rep. 956.

62. COURTS—Sentence.—A sentence in the civil courts prescribing different terms of imprisonment imposed for different offenses on the same day will be construed to run concurrently, unless a different intent is expressly indicated in the sentence.—Kirkman v. McClaughry, U. S. C. C., D. Kan., 152 Fed. Rep. 255.

63. CRIMINAL LAW—Harmless Error.—On a trial for practicing medicine without a license, failure to charge on the subject of costs on acquittal of accused held immaterial.—Commonwealth v. Clymer, Pa., 66 Atl. Rep. 560.

64. CRIMINAL TRIAL—Discretion of Court.—The conduct of a criminal trial rests largely in the control and discretion of the presiding judge, and the appellate court should in no case interfere with the judgment, unless there be an abuse of discretion by the trial judge of a character likely to have injured the complaining party.—Esterline v. State, Md., 66 Atl. Rep. 269.

65. CRIMINAL TRIAL—Indictment.—A verdict of acquittal in a criminal case will not be directed at the close of the prosecution's case because of a defect in the indictment, unless it is one which would be fatal on motion in arrest of judgment.—Stearns v. United States, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 900.

66. CUSTOMS AND USAGES—Validity.—A custom or usage requiring a shipper of lumber under guaranty of count and inspection at destination to abide by the unsworn statement of the consignee held invalid.—Byrd v. Beall, Ala., 43 So. Rep. 749.

67. DAMAGES—Interest.—Interest is recoverable in Florida upon the amount of damages awarded in an action of tort, or for breach of a contract, from the date of the accrual of the cause of action.—Griffing Bros. Co. v. Winfield, Fla., 43 So. Rep. 687.

68. DEEDS—Recitals in Quit-Claim Deed.—A clause in a quitclaim deed, to the effect that the grantor makes no representations as to his title, is not a disclaimer of title, nor does it show a prior abandonment of the land.—State Finance Co. v. Meyers, N. Dak., 112 N. W. Rep. 76.

69. DESCENT AND DISTRIBUTION—Authority to Settle Disputed Facts.—One of the several persons interested in the estate of decedent held not entitled to make a settlement of a controversy respecting property of the estate and bind the other persons interested thereby.—Williamson v. Robinson, Iowa, 111 N. W. Rep. 1012.

70. DESCENT AND DISTRIBUTION—Sale of Interest in Estate.—Sale of interest in an estate payable in the future upheld, though price was grossly inadequate.—*In re* Singer's Estate, Pa., 89 Pac. Rep. 548.

71. ELECTIONS—Registration.—Under Const. art. 2, § 4, as a prerequisite to the right to vote, each elector must present to the managers of the election a registration certificate and prove the payment of taxes for the previous year.—Wright v. State Board of Canvassers, S. Car., 57 S. E. Rep. 536.

72. ELECTRICITY—Negligence.—The negligence of a telephone company in leaving wires in a tree on abandoning a system held the proximate cause of an accident caused by one of the wires coming in contact with a live trolley wire and cummunicating an electric current to a wire fence nailed to a tree.—Home Telephone Co. v. Fields, Ala., 43 So. Rep. 711.

73. EMBEZZLEMENT—Elements of Offense.—Though one may be a servant or agent *de facto*, one who is not lawfully an agent or servant and does not hold himself out as such held not guilty of embezzlement.—Tipton v. State, Fla., 43 So. Rep. 684.

74. EQUITY—Laches.—Six years' delay in commencing suit after discovery by principal of tax title in its agent to mining property held laches sufficient to estop the principal from maintaining the suit.—Steinbeck v. Bon Homme Min. Co., U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 833.

75. ESTOPPEL—Failure to Assert Right.—Where one sells property of another, and such other receives the proceeds of the sale with knowledge, he is estopped from thereafter asserting title as against the purchaser.—Garbutt & Donovan v. Mayo, Ga., 57 S. E. Rep. 495.

76. EVIDENCE—Documentary.—Whether the records by an employee in the regular course of business are so verified as to be entitled to admission as original evidence held in the discretion of the trial court.—Strand v. Great Northern Ry. Co., Minn., 111 N. W. Rep. 958.

77. EVIDENCE—Nonexpert Testimony as to Speed of Car.—A nonexpert witness possessing the usual knowledge of time and distance is competent to give his opinion of the speed of a street car.—Hall v. St. Louis & S. Ry. Co., Mo., 101 S. W. Rep. 1187.

78. EVIDENCE—Objections to Production of Books.—Books and papers required by an order of court to be produced by a party on the trial of a cause remain subject to their objections to their relevancy as evidence which must be passed upon at the trial.—International Coal Min. Co. v. Pennsylvania R. Co., U. S. C. C., E. D. Pa., 152 Fed. Rep. 557.

79. EXCHANGE OF PROPERTY—Breach of Contract.—Where a contract for an exchange of personalty for land is rescinded after the personalty has been delivered to the owner of the land and disposed of by him, the measure of damages is the reasonable market value of the personalty.—Fagan v. Hook, Iowa, 111 N. W. Rep. 981.

80. FEDERAL COURTS—Jurisdiction.—The jurisdiction of a federal court includes the power to enforce the judgment, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states.—Collin County Nat. Bank v. Hughes, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 414.

81. FIXTURES—Annexation.—A boiler placed in a horse stable by the owner of the premises, to which boiler a gutter from a well on the premises ran, held a part of the realty.—Brigham v. Overstreet, Ga., 57 S. E. Rep. 484.

82. FIXTURES—Agreement of Parties.—By agreement between the owner and mortgagee of the realty, personal property may retain its status after annexation, and such agreement or intention may be inferred by circumstances.—Young v. Chandler, Me., 66 Atl. Rep. 539.

83. FRAUDS, STATUTE OF—Agreements in Consideration of Marriage.—An oral contract made prior to and in consideration of marriage held not enforceable in view of the statute of frauds.—Frazer v. Andrews, Iowa, 112 N. W. Rep. 92.

84. FRAUDS, STATUTE OF—Death of Party.—The death of a party to a contract for work and labor not to be performed within a year would not take the contract out

of the statute of frauds.—White v. Fitts, Me., 66 Atl. Rep. 583.

85. FRAUDS, STATUTE OF—Part Performance.—A parol contract for the conveyance of real estate held not void under the statute of frauds, but enforceable in equity after performance by one of the parties thereto.—Powers v. Crandall, Iowa, 111 N. W. Rep. 1010.

86. GAMING—Burden of Proof.—In an action by a stockholder to recover a balance due for certain stocks alleged to have been purchased for defendant, the burden of showing that the contracts were mere gambling contracts was on defendant, the law presuming their validity.—King v. Zell & Merceret, Md., 66 Atl. Rep. 279.

87. GAMING—Contracts for Option Futures.—If a broker was privy to wagering contracts for option futures, and brought the parties together, he could not recover for advances made by him on account of principal in forwarding such illegal contracts.—L. J. Anderson & Co. v. Holbrook, Ga., 57 S. E. Rep. 500.

88. HABEAS CORPUS—Custody of Children.—Where the court acquired jurisdiction of a mother and her children in proceedings to determine the custody of the children, it had power to modify such decree, though the mother and children removed to another state.—Dixon v. Dixon, N. J., 66 Atl. Rep. 597.

89. HABEAS CORPUS—Extradition Proceedings.—Where a petitioner for a writ of *habeas corpus* is held in custody under an executive warrant based upon an extradition proceeding, the burden is on petitioner to show why the warrant should not be executed.—Blackwell v. Jennings, Ga., 57 S. E. Rep. 484.

90. HOMESTEAD — Right of Surviving Wife.— Under Const. 1901, §§ 205, 208, granting to a widow the homestead of her husband as exempt, where a man had a homestead capable of allotment, his widow is confined to it, and cannot select another out of his other lands.—McGaugh v. Davis, Ala., 43 So. Rep. 745.

91. HOMICIDE—Assault with Intent to Murder.—Persons held guilty of assault and battery with intent to kill and murder where they follow up an adversary after he had abandoned the conflict and again attack him while in no danger of injury to themselves.—Canterberry v. State, Miss., 43 So. Rep. 678.

92. INDICTMENT AND INFORMATION—Limitations of Action —In a prosecution for a misdemeanor, proof that the indictment was in lieu of a prior one, which had been dismissed, held indispensable to sustain a conviction; the offense being barred by limitations.—R. M. Hughes & Co. v. Commonwealth, Ky., 101 S. W. Rep. 1194.

93. INNKEEPERS—Wrongful Use of Room.—A guest occupying room in a hotel with his family cannot be held liable to the landlord for permitting a nurse in his employ to remain in such rooms and to be there delivered of an illegitimate child.—Parkes v. Seasongood, U. S. C. C., D. R. I., 152 Fed. Rep. 583.

94. JUDGES—Disqualification.—A judge holding a policy in a mutual life insurance company held disqualified to preside at the trial of an action to recover on a policy of insurance issued by that company.—New York Life Ins. Co. v. Sides, Tex., 101 S. W. Rep. 1163.

95. LANDLORD AND TENANT—Construction of Lease.—Assignee of lessor as agent of undisclosed principal held entitled to enjoin lessee from moving improvements in violation of option granted lessor.—Isman v. Hanscom, Pa., 66 Atl. Rep. 829.

96. LARCENY—Custody by Servant or Agent.—Where a person, though he accepted in good faith the custody of a lost bank check for delivery to its owner, subsequently appropriated it to his own use with felonious intent, he was guilty of larceny.—State v. Levine, Conn., 66 Atl. Rep. 529.

97. LIBEL AND SLANDER—Privileged Communication.—A statement of an employer to the father of a discharged employee as to the reason of the discharge, in response to inquiry made by the father, is privileged, but a voluntary statement made by the employer is not privileged.—Rosenbaum v. Roche, Tex., 101 S. W. Rep. 1164.

98. LIFE INSURANCE—Law Governing Remedy.—Where a life insurance contract is expressly made subject to the laws of a particular state, the remedy of the insured for an anticipatory breach thereof by the company is governed by the law of such state —Michaelson v. Security Mut. Life Ins. Co., U. S. C. C., E. D. Pa., 150 Fed. Rep. 224.

99. LOGS AND LOGGING—Lien for Tolls.—Where by the charter, a dam and improvement company is given a lien for tolls on logs driven down a stream, the party whose interest is directly affected by such lien held liable for the tolls.—Madunkeunk Dam & Improvement Co. v. F. E. Allen Clothing Co., Me., 66 Atl. Rep. 536.

100 LOST INSTRUMENTS — Laches.—Laches does not constitute a defense to an action to compel the execution by the grantor of a deed to take the place of one heretofore executed and lost by the grantee.—Shugars v. Shugars, Md., 66 Atl. Rep. 273.

101. MANDAMUS—To Tax Assessors.—*Mandamus* should not be issued to compel municipal assessors to act on an application for abatement of a tax, when the application was barred by the omission of the applicant to furnish the assessors with a list of his taxable property, as required by Rev. St., ch. 9, §§ 73, 74.—Edwards Mfg. Co. v. Farrington, Me., 66 Atl. Rep. 809.

102. MANDAMUS—When Writ Will Lie.—*Mandamus* held to lie to set a refractory board of canvassers in motion, but not to control its action in recounting votes.—Dickinson v. Board of County Canvassers of Cheboygan County, Mich., 111 N. W. Rep. 1075.

103. MASTER AND SERVANT—Inspection of Machinery.—It being impossible to discover incipient fractures in a piston rod of an engine without detaching the parts, no presumption of negligence arises as to the sufficiency of the rod by reason of an accident.—Cederberg v. Minneapolis, St. P. & S. S. M. Ry. Co., Minn., 111 N. W. Rep. 953.

104. MASTER AND SERVANT—Liability for Servant's Negligence.—The owner of an automobile held not liable for personal injuries caused by the negligence of his driver in running the machine too fast on the highway, where the driver was at the time in sole charge of the machine, and had departed from the master's instructions, and was using it for his own purposes.—Patterson v. Kates, U. S. D. C., E. D. Pa., 152 Fed. Rep. 481.

105. MASTER AND SERVANT — Proof of Negligence.—Where a miner was killed by falling down a shaft in the mine from one level to another, but there was no evidence to show how or why he fell, there can be no inference of negligence on the part of the mine owner which would warrant a recovery for his death.—Leonard v. Mill & Min. Co., U. S. C. C. of App., Fourth Circuit, 148 Fed. Rep. 827.

106. MASTER AVD SERVANT—Railroad Fires.—Where a fire was started by the negligence of a sub-boss of a railroad bridge and trestle crew, while he was not on duty and not engaged in the business of the railroad company, it was not liable for the result of acts at common law.—Southern Ry. Co. v. Power Fuel Co., U. S. C. C. of App., Fourth Circuit, 152 Fed. Rep. 917.

107. MASTER AND SERVANT—Safe Place to Work.—The duty of caring for the safety of a place of machinery, where the work necessarily changes the character of the place or the machinery as to safety as the work progresses, is the duty of the servants, and not of the master.—Kreigh v. Westinghouse, Church, Kerr & Co., U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 120.

108. MASTER AND SERVANT—Status of Trained Nurse.—A trained nurse performing her usual duties with the skill which is the result of training in that profession does not come within the definition of servant, but rather is one who renders personal services to an employer in the pursuit of an independent calling, and the employer is not liable as master for her acts.—Parkes v. Seasongood, U. S. C. C., D. R. I., 152 Fed. Rep. 583.

109. MASTER AND SERVANT—Warning of Danger.—A custom of a railroad to warn employees in its yard tracks of the approach of a switch engine relieves such em-

ployees from the strict rule of self-protection.—Floan v. Chicago, M. & St. P. Ry. Co., Minn., 111 N. W. Rep. 957.

110. MONOPOLIES—Reservation in Deeds as to Use of Streets.—A reservation in dedicatory deeds of the right in the grantors to the exclusive use of the streets and alleys so dedicated for the maintenance of street rail roads, lighting, sewers, gas, telepho es, etc., held contrary to public policy, as tending to create a monopoly. —Jones v. Carter, Tex., 101 S W. Rep. 514.

111. MORTGAGES—Assignment to Mortgagor.—The act of a mortgagor in paying the principal and interest due on his mortgage and taking an assignment of it held not to be a discharge of the mortgage.—Scribner v. Malinowski, Mich , 111 N. W. Rep. 1082.

112. MUNICIPAL CORPORATIONS—Excavations.—In an action for injuries to a traveler at night by his vehicle coming in contact with earth excavated from the street, an instruction submitting the question of the excavator's negligence in placing the earth where it was held erroneons.—Citizens' Gas & Electric Co. v. Nicholson, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 389.

113. MUNICIPAL CORPORATIONS — Mandamus.—A *mandamus* against a city and its officers to provide for the payment of a judgment against it is continuous in its operation, and the court may bring in new parties and modify its order from time to time to meet the exigencies of the case.—Cunningham v. City of Cleveland, Tenn., U. S. C. C. of App., Sixth Circuit, 152 Fed Rep. 907.

114. MUNICIPAL CORPORATIONS—Obstruction on Sidewalks —A city, under its charter, held not liable to one injured by reason of an obstruction on a sidewalk, notwithstanding the general statute imposing liabilities on cities failing to keep sidewalks in a reasonably safe condition.—Maclam v. City of Marquette, Mich., 111 N. W. Rep. 1079.

115. MUNICIPAL CORPORATIONS—Ordinances Licensing Auctioneers.—Ordinance of city of Duluth for the licensing of auctioneers providing that such license should not authorize the licensee to conduct any auction sale of jewelry or watches held valid.—State v. Bates, Minn., 112 N. W. Rep. 67.

116. MUNICIPAL CORPORATIONS—Removal of Railroad Tracks.—A regulation by a city requiring a railroad to change the location of its tracks in a street is a valid exercise of municipal police power, where the regulation is reasonable.—Atlantic & B. Ry. Co v. City of Cordele, Ga., 57 S. E Rep. 493.

117. MUNICIPAL CORPORATIONS—Torts of Officers.—A dog catcher appointed by chief of police under a city ordinance is himself a public officer, and hence the chief of police is not responsible for the dog catcher's misconduct in office.—Casey v. Scott, Ark., 101 S. W. Rep. 1152.

118. NEW TRIAL—Grounds.—In an action for the killing of a dog, where "willfulness" was not within the issues made by the pleadings, an instruction involving that element held ground for a new trial.—Mobile & O. R. Co. v. Glover, Ala., 43 So. Rep. 719.

119. NOTICE — Facts Putting on Inquiry.—Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.—Coder v. McPherson, U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 951.

120. PARTNERSHIP—Firm and Individual Creditors.—The sale by one member to the other member of an insolvent firm of his interest being in bad faith, held, that funds so received by the purchaser and paid to his individual creditors could be recovered for firm creditors.—Blake v. Sargent, U. S. D. C., D. Mo., 152 Fed. Rep. 263.

121. PARTNERSHIP—Rescission of Agreement.—Where a partnership has been entered into because of false representations, equity will set the contract aside at the suit of the deceived party and appoint a receiver —Jones v. Weir, Pa., 66 Atl. Rep. 550.

122. PLEADING—Insufficient Affidavit of Defense.—In action for goods sold and delivered, where plaintiff produces in court notes given for the price, the court cannot impound the same and make rule for judgment absolute —Scott Mfg. Co. v. Morgan, Pa., 66 Atl. Rep. 566.

123. PLEADING—Theory of the Case.—A petition showing a cause of action held good against a general demurrer, though it discloses that the action was brought on the wrong theory.—Thompson v. Mills, Tex., 101 S. W. Rep. 560.

124. PRINCIPAL AND AGENT—Liability of Agent for Principal's Default —An agent negotiating an exchange which his principal repudiates cannot be proceeded against as a principal and compelled to specifically perform the contract.—Doolittle v. Murray & Co , Iowa, 111 N. W. Rep. 999.

125. PRINCIPAL AND SURETY — Bond of Bidder for Government Work.—A contract for government work let after default of the first bidder considered, and held to be for the same work as that covered by his bid, and not to release his sureties from liability for the increased cost under the terms of their bond.—Brown v. United States, U. S. C. C. of App., Second Circuit, 152 Fed. Rep. 964.

126. PROCESS—Jurisdiction In Rem.—Where jurisdiction *in rem* is sought to be obtained by publication, it will not be assumed or exercised on the general ground that the court had jurisdiction of the subject-matter, but can be conferred only by an exact compliance with the statutory provisions conferring jurisdiction.—Cohen v. Portland Lodge No. 142, B. P. O. E., U S. C. C. of App., Ninth Circuit, 152 Fed. Rep. 357.

127. PUBLIC LANDS—Patent from State.—A patent from the state conveys the legal title, and cannot be revoked except on judicial proceedings instituted by the sovereign.—Smith v. Crandall, La., 43 So. Rep. 699.

128 PUBLIC LANDS—Railroad Grants.—Title to land within the primary or place limits of a railroad grant ordinarily passes on the filing of the map of definite location and the acceptance thereof, while land within the indemnity limits does not pass until selection under the direction or with the approval of the s cretary of the interior.—United States v. Oregon & C. R Co., U. S. C. C., D. Oreg., 152 Fed. Rep. 473.

129. QUO WARRANTO—Ward Committeeman.—The office of democratic ward committeemen of a city not being a public office, the attorney general was not entitled to institute a proceeding in equity in the nature of *quo warranto* to oust certain incumbents therefrom.—Greenough v. Lucey, R. I., 66 Atl. Rep. 300.

130. RAILROADS — Failure of Passenger to Procure Ticket.—Where a passenger fails to provide himself with a ticket, he may be compelled to pay fare at the train rate, and on refusal may be ejected.—Southern Ry. Co. v. Fleming, Ga , 57 S. E. Rep. 481.

131. RAILROADS—Forfeiture of Right of Way.—A railway company held to forfeit a grant of a right of way by failing to construct a line of railway over the land within five years —McDowell v. Blue Ridge & A. Ry. Co., N. Car., 57 S. E. Rep. 520.

132. RAILROADS — Injuries to Animal on Track.—Whether the failure of railroad employees to ring the bell and blow the whistle in order to scare an animal off the track constituted want of ordinary care, which was the proximate cause of an injury, was a question for the jury —Texarkana & Ft. S. Ry. Co. v. Bell, Tex., 101 S. W. Rep. 1167.

133. RAILROADS—Injury to Stock on Track.—In an action against a railroad for killing stock, it was not error to give an instruction on the question of negligence in exceeding the speed limit imposed by a city ordinance, although the ordinance was not set up in the pleading.—Louisville & N. R Co. v. Christian Moerlin Brewing Co., Ala., 43 So. Rep. 723.

134. RECORDS—Right of Inspection.—Under Comp. Laws, §§ 8604-8611, relating to marriage licenses and returns, and section 8612 *et seq.*, the record of marriage licenses held public and open to inspection, under Pub. Acts 1903, p. 102, No. 76, making public records open to inspection for any lawful purpose.—Kalamazoo Gazette Co. v. Vosburg, Mich., 111 N. W. Rep. 1070.

135. REFERENCE—Report of Referee.—The court will not review the findings or conclusions of a referee to whom a cause has been referred to pass upon all questions, both of fact and law, unless to correct a manifest clerical error.—Kilduff v John A. Roebling's Sons Co., U. S. C. C., S. D. N. Y., 150 Fed. Rep 240.

136. REMOVAL OF CAUSES - Condemnation Proceedings.—A suit by a railroad company to restrain a telegraph company of different citizenship from maintaining proceedings to condemn a right of way for telegraph line along the railroad's right of way held removable to the federal court.—Georgia R. & Banking Co. v. Atlantic Postal Telegraph Cable Co., U S. C. C., S. D. Ga., 152 Fed. Rep. 991.

137. REPLEVIN—Defenses.—It is no defense to an action for illegal seizure of personalty that defendant had an equitable mortgage on property, where there was an unpaid installment of the price at the time of the seizure.—Murdouch v. Tuten, S. Car., 57 S. E. Rep. 547.

138. REPLEVIN—Elements.—Where a city's chief of police was not in possession of a dog at the time plaintiff demanded possession, he could not maintain replevin against such officer because of the city dog catcher's refusal to surrender the dog until payment of an alleged illegal tax.—Casey v. Scott, Ark., 101 S. W. Rep. 1152.

139. SALES—Construction of Contract.—Where a contract for the sale of lumber guarantied count and inspection at destination, such provision had no reference to the evidence that would be necessary to prove what the real condition of the lumber was on arrival.—Byrd v. Beall, Ala., 43 So. Rep. 749.

140. SHERIFFS AND CONSTABLES - Recovery of Excessive Fees.—Where a sheriff was paid more than he was entitled to by the failure of the board of supervisors to consider certain fees received by him for services performed as constable, the county was entitled to recover the excess.—Jones County v. Arnold, Iowa, 111 N. W. Rep. 973.

141. STATES—Consent in Actions Against.—An action against an agricultural college owned by the state, for damages caused by the erection of a dike, is an action against the state which cannot be maintained without its consent.—Hopkins v. Clemson Agricultural College, S. Car., 57 S. E. Rep. 551.

142. STREET RAILROADS—Contributory Negligence of Child.—Whether a six-year old child was guilty of contributory negligence in crossing a street in front of an approaching street car, by which she was struck and injured, was a question for the jury.—Van Salvellergh v. Green Bay Traction Co., Wis., 111 N. W. Rep. 1120.

143. TAXATION—Tax Deeds.—The original owner of certain land held not guilty of laches because of delay of three or four years before instituting suit to cancel a tax deed as a cloud on title after the issuance of a writ of assistance to the holder of the tax title.—G. F. Sanborn Co. v. Johnson, Mich., 111 N. W. Rep. 1091.

144. TELEGRAPHS AND TELEPHONES — Damages for Delay in Delivering Message.—A verdict for $2,000 for delay in delivering telegram, preventing the addressee attending her mother's funeral, held not excessive.—Western Union Telegraph Co. v. Hardison, Tex., 101 S. W. Rep. 541.

145. TELEGRAPHS AND TELEPHONES—Duty to Deliver Message.—A telegraph company held not relieved of the duty of delivering a message to the addressee.—Western Union Telegraph Co. v. Gamble, Tex., 101 S. W. Rep. 1166.

146. TELEGRAPHS AND TELEPHONES—Failure to Deliver Telegram.—In action for failure to deliver telegram, a witness can testify as to circumstances tending to show persons receiving instructions as to telegram an agent of the telegraph company.—Bolton v. Western Union Telegraph Co., S. Car., 57 S. E. Rep. 543.

147. TREATIES—Construction.—Whenever a conflict is alleged to exist between a treaty requiring ratification and a legislative act of amendment, the courts in construing them, while endeavoring to give effect to both, if they cannot be reconciled, will give effect rather to the legislative amendment.—Wadsworth v. Boysen, U. S. C. C. of App., Eighth Circuit, 148 Fed. Rep. 771.

148. TRIAL—Direction of Verdict.—The presiding justice at a jury trial may direct a verdict for either party, when a contrary verdict could not be sustained by the evidence.—Young v. Chandler, Me., 66 Atl. Rep. 539.

149. TRUSTS—Purchase at Judicial Sale.—An agent or trustee may lawfully buy the property of his principal or *cestui que* trust at a judicial sale caused by a third party which he has no part in procuring, and over which he has no control.—Steinbeck v. Bon Homme Min. Co., U. S. C. C. of App., Eighth Circuit, 152 Fed. Rep. 333.

150. VENDOR AND PURCHASER—Lost Instruments.—In an action to compel the execution of a deed to replace one theretofore executed by defendants to plaintiff and lost by him, defendants held not entitled to a vendor's lien on the land for the consideration named in the deed.—Shugars v. Shugars, Md., 66 Atl. Rep. 273.

151. VENDOR AND PURCHASER—Rescission.—That a party made a poor bargain is no cause for setting aside the trade, where she traded after advice of others, and had an opportunity to rue back.—Thurman v. Ellinor, Ark., 101 S. W. Rep. 1154.

152. WASTE—Injunction.—An injunction will lie to prevent the commission of waste, though it will not cause irreparable damage, and the party threatening to commit it is solvent. Brigham v. Overstreet, Ga., 57 S. E. Rep. 484.

153. WATERS AND WATER COURSES—Diversion of Waters.—Where the legislature had granted authority to divert water from a great pond for public purposes, without requiring proceedings for condemnation, or for the payment of damages, the grantee can begin such diversion at once, and it will not be restrained until such proceedings are had.—American Woolen Co. v. Kennebec Water Dis., Me., 66 Atl. Rep. 316.

154. WATERS AND WATER COURSES — Incorporeal Hereditaments.—The right of an appropriator of the water of a stream for irrigation to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch.—Rickey Land & Cattle Co. v. Miller & Lux, U. S. C. C. of App., 152 Fed. Rep. 11.

155. WATERS AND WATER COURSES—Riparian Rights.—Though riparian owners have a right to have the natural flow of a stream continue unobstructed, and any invasion of this right may constitute a nuisance, the right may be lost by prescription.—Marshall Ice Co. v. La Plant, Iowa, 111 N. W. Rep. 1016.

156. WHARVES—Construction of Lease.—A landlord held not entitled to compel tenant to pay the cost of cleaning an adjoining dock, required under the law to be paid by the owner of the pier.—Haley v. American Agricultural Chemical Co., Pa., 66 Atl. Rep. 559.

157. WILLS—Signature.—Where a testatrix did not sign her will in the presence of the attesting witnesses, and made no sign of assent when the scrivener said, apparently with reference to the paper: "This is her name," the signature is not valid.—Manners v. Manners, N. J., 66 Atl. Rep. 588.

158. WITNESSES—Examination by Court.—Though a trial judge may question a witness, his examination should be guarded so as not to give even a hint of his opinion as to the witness' veracity, or any impression he may have as to the merits of the case.—Dreyfus v. St. Louis & S. Ry. Co., Mo., 102 S. W. Rep. 53.

159. WITNESSES—Impeachment.—In an embezzlement trial, general good reputation for truth and veracity was inadmissible to support defendant's testimony impeached by proof of conflicting testimony before the grand jury.—State v. Hoffman, Iowa, 112 N. W. Rep. 103.

160 WITNESSES—Logs and Logging.—A surveyor's scale book held competent to refresh the recollection of the surveyor.—Madunkeunk Dam & Improvement Co. v. F. E. Allen Clothing Co., Me., 66 Atl. Rep. 587.